Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. _____

DANNY L. GRIFFIN,
Petitioner

v.

OCEANIC CONTRACTORS, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, Danny L. Griffin, prays that a writ of certiorari to review the opinion and judgment of the United States Court of Appeals, Fifth Circuit, rendered in these proceedings on June 17, 1981 be granted.

QUESTIONS PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeals' holding that the duration of time for which penalty wages are awarded seamen under 46 U.S.C. § 596 is left to the equitable discretion of the trial court is erroneous inasmuch as the Third and Ninth Circuits have previously held that the trial court is mandatorily bound to assess penalty wages for the exact time period called for by 46 U.S.C. § 596.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE DISTRICT COURT AND CIRCUIT COURT

Petitioner, Danny L. Griffin

Oceanic Contractors, Inc., Respondent

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v.

OCEANIC CONTRACTORS, INC.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY COURTS BELOW

1. The opinion of the District Court was delivered the 7th day of May, 1980, Cause No. S-78-26-CA in the United States District Court for the Eastern District of Texas, Sherman Division (unreported). The judgment of the District Court is attached hereto as Appendix I.

2. The judgment and opinion of the United States Court of Appeals for the Fifth Circuit, dated the 17th day of June, 1981 is unreported and appears under Decisions Without Published Opinions at 650 F.2d 281; Civil Action No. 80-1599, United States Court of Appeals for the Fifth Circuit. The judgment and opinion of the United States Court of Appeals, Fifth Circuit, are attached hereto as Appendix III.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals was entered on June 17, 1981. No petition for rehearing and rehearing en banc was thereafter filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES WHICH THIS CASE INVOLVES

1. This case involves an interpretation and construction of federal statute, 46 U.S.C. § 596 and the application and award of the penalty provisions contained therein. The statute is reprinted as Appendix IV to this petition.

STATEMENT OF THE CASE

A. Course of Proceedings Below

Petitioner filed suit on February 1, 1978 and by his original complaint, alleged that between February and April, 1976 the Petitioner, while working as a seaman aboard a vessel owned and operated by the Respondent, sustained serious and disabling injuries outside the terri-

torial waters of the United States, as a result of the negligence of the Respondent under the Jones Act, 46 U.S.C. § 688 and the unseaworthiness of the vessel. The Petitioner asserted a cause of action under the Jones Act, the General Maritime Law and 46 U.S.C. § 596, providing for recovery of double wages for wrongful withholding of wages by a discharged seaman's employer. The Respondent answered in response to Petitioner's original complaint, asserting the defenses of Petitioner's negligence, unavoidable accident and intervening cause.

Thereafter, trial was conducted before the Court sitting without a jury. After hearing all the evidence and arguments presented by counsel, the Court filed its Findings of Facts and Conclusions of Law (attached as Appendix II) and its Judgment on May 7, 1980, generally favorable to Petitioner.

The Trial Court awarded Petitioner penalty wages under 46 U.S.C. § 596 from April 1, 1976, the date of Petitioner's discharge by Respondent until May 5, 1976, a period of 34 days (Conclusion of Law No. 11). The Court awarded Petitioner a total of $6,881.60 as the penalty. It is undisputed that Petitioner Griffin was not paid all of his earned wages after his discharge (District Court's Conclusions of Law No. 10, Appendix II) and that Respondent's failure to pay Petitioner's earned wages was a wrongful withholding without sufficient cause in violation of 46 U.S.C. § 596. (District Court's Conclusions of Law No. 11.) Petitioner was not in fact paid his wrongfully withheld earned wages by Respondent until September, 1980, some 53 months after his discharge from Respondent's employ. Satisfaction of

Judgment was filed by Respondent on September 22, 1980 acquitting the Respondent with respect to the final judgment entered on May 7, 1980.

Petitioner's appeal to the United States Court of Appeals, Fifth Circuit addressed two main issues: (1) the refusal of the Trial Court to award Petitioner full wages (straight time, overtime and bonuses) for the entire period of Petitioner's contractual employment and (2) the failure of the Trial Court to award Petitioner the full statutory penalty manadated by 46 U.S.C. § 596 of double-daily wages for each day earned wages were withheld by Respondent until the time of actual payment by the Respondent in September, 1980.

The Court of Appeals agreed with the District Court's holdings on both of these issues. Regarding the penalty wage issue, the Court of Appeals held that the duration on applying the penalty wage statute is left to the sound discretion of the District Court.[1]

However, in its opinion at Footnote 4, the Court of Appeals noted the clear conflict between the Circuits concerning the proper application of the penalty time period. Petitioner respectfully urges that 46 U.S.C. § 596 establishes a mandatory time period for its application, i.e. from date of discharge until date of actual payment. This literal interpretation of the statute has heretofore been diluted by those circuits, namely the First, Second, Fourth and Fifth which allow judicial tailoring of the statute by the sound discretion of the Trial Court. Such

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1. Caribbean Federation Lines v. Dahl, 315 F.2d 370, 374 (5th Cir.) cert. den., 375 U.S. 831 (1963); Ventiadis v. C. J. Thibodeaux & Co., 295 F. Supp. 135, 138 (D.C. Tex. 1968).

an interpretation dilutes the purpose and effect of the statute, that being to protect seamen from the harsh consequences of arbitrary and unscrupulous actions of their employers.[2] The Courts adopting the majority discretionary view have so far departed from the clear and concise command of the statute regarding the penalty time period that they have virtually rewritten the statute. Such modification of a federal remedial statute, passed by the Congress has no judicial precedent. Admiralty courts must enforce this statute according to its express provisions, and not question the results mandated by their application. Such power in the Courts, in effect, transforms those judicial bodies into a super-legislature. Petitioner requests the Honorable Court to uphold the literal interpretation of this statute and to restore the protective vitality and impact of a remedial plan which the federal legislative body intended to put in effect for the good of the wards of admiralty.

B. Basis For Federal Jurisdiction In The District Court

The jurisdiction of the District Court was sought by Petitioners under the Jones Act and the General Maritime Law of the United States.

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2. American Foreign Steamship Co. v. Matise, 423 U.S. 150 (1975), reh. den. 424 U.S. 979.

ARGUMENT AND REASONS FOR ISSUANCE OF WRIT

I.

THE COURT OF APPEALS' HOLDING THAT THE APPLICATION OF THE PENALTY WAGE PERIOD SET FORTH IN 46 U.S.C. § 596 IS DISCRETIONARY WITH THE DISTRICT COURT HAS FAR REACHING CONSEQUENCES AFFECTING VIRTUALLY EVERY AMERICAN SEAMAN AND BECAUSE SUCH HOLDING DIRECTLY CONTRADICTS RECENT DECISIONS OF THE THIRD AND NINTH CIRCUITS AND SO FAR DEPARTS FROM THE EXPLICIT PROVISION OF THE STATUTE, THE EXERCISE OF THIS COURT'S POWER OF REVIEW IS BOTH NECESSARY AND PROPER.

The Court of Appeals holding that the duration on applying the wage penalty statute[3] is left to the sound discretion of the district court, directly conflicts with recent decisions[4] of the Third and Ninth Circuits, which view § 596 as establishing a mandatory time period for its application. Two lines of authority have developed regarding the applicable period for which the statutory penalty is to be assessed. The Third Circuit in *Swain* held that judicial discretion *does not* exist to tailor the statutory penalty for wrongful withholding from a seaman's wages to the equities of a particular case. That Court held that once the statute is found to apply, the

3. 46 U.S.C. § 596.

4. Swain v. Isthmian Lines, Inc., 360 F.2d 81 (3rd Cir. 1966); Larkins v. Hudson Waterways Corp., 640 F.2d 997 (9th Cir. 1981); Thomas v. S.S. Santa Mercedes, 572 F.2d 1331 (9th Cir. 1978).

penalty *must* be imposed from the date the seaman's wages were originally due him until the date the seaman's wages are actually paid.[5] The Ninth Circuit interpreted the same statutory language to be "unequivocal and mandatory", reasoning that the abandonment of a seaman in a foreign port without wages was exactly what prompted Congressional enactment of 46 U.S.C. § 596.

The second line of authority, to which the Fifth Circuit adheres, interprets the penalty time period to rest solely in the discretion of the court, subject to the equities of each individual case.[6] This Honorable Court recently noted the Fifth Circuit view in *American Foreign S.S. Co. v. Matise*[7] and that the discretionary time period application has been endorsed by the First,[8] Second[9] and Fourth[10] Circuits.

In light of the present conflict between the Circuits and the unequal remedies available to seamen, resulting from the several interpretations of the penalty wage statute and depending upon the particular geographic arena possessing jurisdiction over the litigation, we urge

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5. Accord, *Escobar v. S. S. Washington Trader*, 509 F.2d 271, 274 (9th Cir. 1974), vacated and remanded on other grounds, 423 U.S. 1070 (1976).

6. Note 1, supra, at p. 4; Ventiadis v. C. J. Thibodeaux & Co., 295 F. Supp. 135, 138 (D.C. Tex. 1968).

7. Note 2, supra, at p. 4.

8. Mavromatis v. United Greek Shipowners Corp., 179 F.2d 310 (1st Cir. 1950).

9. Forster v. Oro Navigation Co., 228 F.2d 319 (2nd Cir. 1955), aff'g. 128 F. Supp. 113 (S.D. N.Y. 1954).

10. Southern Cross S.S. Co. v. Firipis, 285 F.2d 651 (4th Cir. 1960), cert. denied 365 U.S. 869 (1961).

the Honorable Court to exercise its power of review and resolve the conflict over this issue in the interests of uniformity of remedies available to injured seamen and in the interests of uniformity of maritime law, in this case under federal statute. It is perfectly reasonable for the Court to afford equal statutory protections to all seamen faced with the peril of penniless abandonment at the time of discharge, regardless of the geographic forum for the resulting litigation. We would further urge the Court to hold that 46 U.S.C. § 596 must be read as a mandatory command to the judiciary so that henceforth uniformity of seamen's remedies and judicial administration of those remedies will prevail. Unequal remedies available to seamen arising out of the same federal statute will continue if this Court does not resolve this question.

The Courts adopting the majority discretionary view have so far departed from the clear and concise command of the statute regarding the penalty time period that they have virtually rewritten the statute. Such modification of a federal remedial statute, passed by the Congress, has no judicial precedent. Admiralty courts must enforce this statute according to its express provisions, and not question the results mandated by their application. Any power in the Courts, to question federal legislation, in effect, transforms those judicial bodies into a super-legislature.

II.

ANY POWER IN THE COURTS TO EXERCISE DISCRETION IN THE AWARD OF PENALTIES SUCCESSFULLY DEFEATS THE MANIFEST AND UNDISPUTED INTENT OF CONGRESS TO BOTH PUNISH SHIPOWNERS AND OTHERS WHO WRONGFULLY WITHHOLD EARNED WAGES FROM SEAMEN AND TO PROTECT SEAMEN FROM THE HARSH CONSEQUENCES OF ARBITRARY AND UNSCRUPULOUS ACTIONS OF THEIR EMPLOYERS.

> The purpose of section 596 is to give the seaman funds on which to live when he is left ashore. [Citation] Regardless of whether he is discharged for cause [or properly set ashore] the seaman needs the protection afforded by section 596 when his right to food and quarters on the vessel is terminated. *Thomas v. S. S. Santa Mercedes,* 572 F.2d 1331, 1334-5 (9th Cir. 1978).

Quoting from *Alier v. Sea Land Service, Inc.,* 465 F.Supp. 1106 at p. 1110,

> "The Statute can be considered as one which awards double wages in the nature of compensation or which awards compensation in the nature of a penalty. . . . Notwithstanding, in *Buckley v. Oceanic S.S. Co.,* 5 F.2d 545 (9th Cir. 1925) the holding was that the statute was a penalty intended as compensation to seamen rather than punishment of the master. . . . This Court is in agreement with the proposition that the essential spirit and purpose of the statute is to financially punish the vessel, its owner and/or its master, as the case may be, for the neglectful failure to pay wages. . . . It is regarded as penalty within the maritime industry. *Petterson v. United States,* 274 F. 1000 (D.C. N.Y. 1921)."

This penalty feature of the statute is precisely what Congress had in mind to motivate shipowners to exercise care in computing wages due a seaman. Thus, the statute as written by Congress, who failed to give the Courts discretionary power to tailor the penalty awarded to the equities of the particular case, is designed to be an effective deterrent to unjust enrichment by shipowners and to the penniless abandonment of seamen in foreign ports. The statute must be strictly construed by the Courts to give effect to the Congressional intent that penalty wages penalize the shipowner and thereby protect the wards of admiralty.

The United States Supreme Court in *American Foreign Steamship Company v. Matise*,[11] refused to address the issue before this Honorable Court of whether or not the trial court can exercise any discretion in determining the amount of the award under Section 596. The Court noted at p. 412 that the Third and Ninth Circuits have found that the trial judge has no discretion in determining the amount of the penalty under Section 596 citing *Swain v. Isthmian Lines, Inc.*,[12] and *Escobar v. S.S. Washington Trader*.[13] In light of the punitive and remedial intent of Congress in formulating 46 U.S.C. § 596, Petitioner asserts that this is the better rule of law and should be applied to the facts of the controversy before the Court. The granting of discretion to the District Court to limit the award of penalty wages to a wronged seaman is in direct contradiction of and dilutes the effectiveness of the statute to deter wrongful conduct and protect the rights of seamen.

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11. Supra, at Note 2, p. 4.
12. Supra, at Note 4, p. 5.
13. Supra, at Note 5, p. 6.

Congress never intended the Courts to apply equitable considerations and factors in mitigation of the statutory penalty, once the provisions of Section 596 are found to apply. To do so will completely destroy assessment of any penalty at all. There is ample room for equitable considerations in determining whether or not *sufficient cause* exists to withhold the seaman's wages. Once the Court makes the determination of lack of *sufficient cause* and finds a wrongful withholding of wages by a Defendant, the Courts should not reevaluate the amount of the penalty assessed by the same equitable considerations. Once a Defendant has been held in violation of Section 596, the penalty must be assessed strictly in accordance with the statute. Any other judicial interpretation allows the Court to effectively rewrite the statute and depart from the historic judicial function of effectuating the spirit and purpose of the law.

That law, particularly Congressional legislation in aid of seamen, is largely remedial and historically calls for liberal interpretation in favor of the seaman as the ward of admiralty.[14] It has been said that

> "Historically, the right to prompt payment of a seaman's wages has been especially favored by admiralty law. The Courts strongly disapprove denial of prompt payment of seaman's wages rightfully due him, and wage statutes are always to be liberally construed in favor of the seaman."[15]

Any interpretation of this federal statute must be made in light of the rules of statutory construction set forth in

14. Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1952).

15. Arguelles v. U.S. Bulk Carriers, Inc., 408 F.2d 1065 (4th Cir.) aff'd 400 U.S. 351 (1971).

Isbrandtsen wherein it was stated that the Courts should give a "natural meaning to legislation like this that obviously is of a remedial, beneficial and amendatory character. It should be interpreted so as to *effect its purpose*." 343 U.S. at p. 783. (Emphasis added.)

The maritime law throughout its history has made the ordinary seaman a member of a favored class—a ward of the admiralty. Congress has through its legislation shown its awareness of the need to protect seamen's rights so that now, such legislation touches almost every facet of a seaman's life. 46 U.S.C. § 596 is a product of this Congressional awareness of seamen's rights. The statute deals explicitly with those who fail to pay seamen wages which they have earned. Such a statute must be construed liberally in favor of the seaman in keeping with the spirit of such legislation and the need for uniform rules in the computation of seaman's penalty wages.

The majority discretionary rule has utterly failed to effectuate the purpose of 46 U.S.C. § 596, that purpose being to encourage the prompt payment of a seaman's wages. Petitioner presents a persuasive case in point. Petitioner was entitled to receive his earned wages on April 1, 1976, the date he was discharged in Antwerp, Belgium. Petitioner was not in fact paid his wrongfully withheld wages by Respondent until September, 1980, over 4 years from the date they were due. Logical men could not say that such action by Respondent was prompt or equitable. However such action clearly demonstrates that the majority discretionary rule does not encourage or compel shipowners/employers such as Respondent to recognize their responsibilities to seamen, neither does the discretionary rule put into effect the purpose of 46 U.S.C. § 596 as required by *Isbrandtsen*.

III.

REGARDLESS OF THE SEVERITY OF A PENALTY RESULTING FROM THE MANDATORY APPLICATION OF 46 U.S.C. § 596, THE STATUTE MUST BE ENFORCED AS WRITTEN BY CONGRESS AND SHOULD NOT BE REWRITTEN BY THE COURTS THROUGH THE INTRODUCTION OF EQUITABLE CONSIDERATIONS.

There are simply no equities existing in favor of a shipowner who abandons a seaman in violation of 46 U.S.C. § 596 and none should be applied in mitigation of the statutory penalty. Such a judicial interpretation so totally departs from the course of Congressional intent that the exercise of this Court's power of review is called for. Such an interpretation effectively pardons the callous and sometimes cruel actions of the shipowner/employer after the fact so that the seaman is, in reality, protected by words alone and the shipowner/employer is virtually free to commit the same wrong again and again, free from fear of substantial penalty.

This exact problem was faced and resolved by the Third Circuit Court of Appeals in the *Swain* case *supra*:

> When considerations fail to establish the existence of sufficient cause for the deduction under section 596, those same equitable considerations may not be reevaluated when the assessment of the penalty is considered. . . . After all, if sufficient cause for the deduction is found to be lacking, the shipowner or his agent has either been overtly culpable in reducing a seaman's wages, or significantly inattentive in his duties vis-a-vis the seaman's wage rights. As we view it, it is precisely the possibility that large penalties will accrue that should motivate a ship-

> owner to exercise care in computing wages due a seaman. We think that this deterrent was what Congress had in mind in providing for a penalty in the form of inflexible liquidated damages. In conclusion, as was aptly stated in the dissenting court of appeals opinion in *Pacific Mail*, upon considering the penalty provision of section 596: . . . as to the severity of the penalty, there is, of course, no thought of suggesting that a court can properly decline to enforce a statute merely because it may seem to be unnecessarily harsh. Once Congress has decided that a penalty is proper such as that provided under 46 U.S.C. § 596, the statute must be read as a mandatory command to the judiciary.
>
> 360 F.2d at 87.

The interpretation of 46 U.S.C. § 596, calling for judicial discretion and the application of equitable considerations in favor of shipowners/employers who have done no equity and deserve none under the statutory scheme enacted by Congress, clearly demonstrates that the exercise of this Court's power of supervision is desperately needed in the interest of justice.

CONCLUSION AND PRAYER

In summary, the issue presented before this Court by Petitioner, regarding the application of the penalty wage statute, 46 U.S.C. § 596, is ripe for review, not only because of the conflicts between the circuits and the far reaching consequences affecting the rights and remedies available to virtually every American seaman but also because the majority discretionary rule violates Congress' intent to penalize and punish those whose actions violate the statute and, in effect, rewrites the statute.

By its provisions, 46 U.S.C. § 596 only punishes conduct which is inequitable. It is, therefore, not only unjust but unthinkable that any Court would apply equitable factors in favor of the malfeasor, in this case the shipowner/employer of Petitioner Danny L. Griffin. Such an application not only violates all traditional principles of equity but also undermines the remedial nature of the statute and the protection of American seamen as the wards of admiralty.

Every case involving the rights of discharged seamen to their earned wages wrongfully withheld will be affected by the Court's decision in this case. Petitioner respectfully moves the Court to grant Writ of Certiorari in order to resolve the very important questions related above and the conflicts between the decisions of the Court of Appeals in this case and the decisions of other circuit courts; and, upon proper briefing and hearing upon the merits, Petitioner requests this Court to reverse this cause on the issue now presented and render Judgment for Petitioner or, alternatively, remand the same to the District Court for the Eastern District of Texas for redetermination of the amount of penalty wages due the Petitioner.

Respectfully submitted,

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Houston, Texas 77002
713/520-0621
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I mailed this day three (3) true and correct copies of the foregoing Petition for Writ of Certiorari to each of the following attorneys, being the only other attorneys of record:

Mr. Theodore Goller
Fulbright & Jaworski
800 Bank of the Southwest Building
Houston, Texas 77002

on this _____ day of September, 1981.

BENTON MUSSLEWHITE

Appendix

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

NO. S-78-26-CA

DANNY L. GRIFFIN

v.

OCEANIC CONTRACTORS, INC.

JUDGMENT

Based upon the findings of fact and conclusions of law this day entered in the above-entitled and numbered civil action, it is

ORDERED, ADJUDGED, and DECREED that plaintiff, Danny L. Griffin, shall be, and he is hereby, awarded judgment against the defendant, Oceanic Contractors, Inc., in the following amounts:

(1) $5,913.68, as recovery for maintenance and cure, earned and unearned wages, repatriation expense and the value of lost personal effects;

(2) $2,506.89, as prejudgment interest on the recovery for maintenance and cure, earned and unearned wages, repatriation expense, and the value of lost personal effects;

(3) $3,368.23, as attorney's fees for the recovery for maintenance and cure, earned and unearned wages, repatriation expense and prejudgment interest; and

(4) $11,881.60, as recovery for pain and suffering and penalty wages.

It is further

ORERED, ADJUDGED, and DECREED that the total amount of this judgment, including attorney's fees, *i.e.*, $23,670.40, shall bear interest at the rate of nine percentum (9%) per annum from this date until paid, and that defendant pay all costs of court.

SIGNED and ENTERED this 6th day of May, 1980.

/s/ WM. WAYNE JUSTICE
Chief Judge

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

CIVIL ACTION NO. S-78-26

DANNY L. GRIFFIN

v.

OCEANIC CONTRACTORS, INC.

FINDINGS OF FACT

1. This civil action is brought by Danny Laried Griffin, as a seaman, against Oceanic Contractors, Inc. At all times material to this action, plaintiff was, and is now, a resident of the State of Texas, and defendant, Oceanic Contractors, Inc., was the owner and operator of "Lay Barge 27".

2. At all relevant times, plaintiff was a seaman, and the "Lay Barge 27" was a vessel in navigation. The "Lay Barge 27" is a special purpose vessel, designed and outfitted for the assembly and installation of marine pipelines.

3. On February 18, 1976, plaintiff signed an employment contract with defendant in New Orleans, whereby he agreed to work as a pipeline welder on board defendant's vessels operating in the North Sea. The employment contract specified that plaintiff's employment was to begin on the date plaintiff departed the United States and extend "until December 15, 1976, or until Oceanic's 1976 pipeline committal in the North Sea is fulfilled, whichever

shall occur first." The employment contract also provided that, for his work as a pipeline welder, plaintiff would receive a base pay rate of $9.65 per hour and an expatriation premium of $720.00 per month; that for his work as a structural welder, plaintiff would be paid $6.65 per hour and an expatriation premium of $495.00 per month.

4. On the same day the employment contract was signed, plaintiff reported to a physician, selected and paid by defendant, in New Orleans, Louisiana, for a physical examination. Plaintiff had had several minor episodes of hemorrhoids in the year preceding the examination. Plaintiff answered all questions asked by defendant's physician at the time of the physical examination. Defendant's physician did not ask plaintiff if he, plaintiff, had ever suffered from hemorrhoids; however, the doctor did examine plaintiff's rectum. The physical examination form states, directly above the space for plaintiff's signature: "I understand this is a limited examination and does not eliminate all possibilities of physical impairment or disease." In light of this provision, a reasonable interpretation of the physical examination form is, that defendant's physician was only interested in information specifically requested. Plaintiff did not intentionally misresent or conceal any material medical facts.

5. On March 7, 1976, defendant provided plaintiff with air transportation to Antwerp, Belgium. Upon arrival, plaintiff reported to the "Lay Barge 27", which was berthed in the harbor of Antwerp.

6. On the "Lay Barge 27", each welder was normally assigned a welder's helper, whose only task was to assist that welder in the performance of his duties. At the time of the accident made the basis of plaintiff's claims, "Lay

Barge 27" was so shorthanded that only one welder's helper was available for the ten to twelve welders assigned to each work shift.

7. The North Sea is a hostile and inclement body of water during the winter months. In order that "Lay Barge 27" would be ready to put to sea as early in the year as possible, defendant followed the practice of having barge crews on board approximately one month ahead of time, to repair damages from the previous year and to perform rigging and maintenance operations necessary to ready the barge for seagoing service. It was contemplated by defendant that, as soon as the barge was made ready by its crew and the North Sea was calmed, "Lay Barge 27" would put to sea and begin its pipe laying season.

8. Oxygen is essential to the welding process. It is usually supplied to welders in tubular metal tanks, called "oxygen bottles", weighing about 125 to 150 pounds. When a welder changes the location of his work, it is necessary to move the oxygen bottle he is using to the new site. It is also necessary to move oxygen bottles, in order to replace an empty one with a full one. Moving an oxygen bottle is a task ordinarily and normally assigned to a welder's helper. It is a difficult assignment, for the oxygen bottles have a smooth surface not conducive to lifting or moving. If an unobstructed passage is present, a bottle is commonly shifted by rolling it across the deck of the vessel; otherwise, it must be lifted across obstacles.

9. "Lay Barge 27" was shorthanded on and before April 1, 1976, as above set out, in that there were an insufficient numbers of welders' helpers available to assist the welders assigned to the vessel. On that day,

plaintiff was engaged in repair and maintenance on the deck of the "Lay Barge 27", which was much cluttered by pipes, machinery and other obstructions. When it became necessary for plaintiff to move an oxygen bottle, no welder's helper was at hand, and he, himself, attempted to lift and move the oxygen bottle. In performing this task, plaintiff so strained himself that he sustained traumatic thrombosed hemorrhoids, a painful and disabling injury.

10. The failure of defendant to maintain an adequately staffed vessel was a breach of its nondelegable duty to maintain a seaworthy vessel, for it is essential that a construction vessel such as the "Lay Barge 27" have on board at all times a crew that is qualified, both in skills and in numbers, to do the job at hand. "Lay Barge 27" was unseaworthy at the time of plaintiff's injury, in a manner that caused plaintiff's injury.

11. Plaintiff exercised his duties as a seaman properly on the occasion in question, and he was not guilty of contributory negligence.

12. April 1, 1976, was the last day plaintiff was aboard "Lay Barge 27" for the purpose of working.

13. The plaintiff left the barge on April 1, 1976, and sought medical attention from Dr. J. Stuyck, a physician in Antwerp, Belgium, to whom plaintiff was referred by a medic in defendant's employ. He was treated conservatively with local anesthetics and other prescriptions. He continued to have difficulty with his hemorrhoids, and on April 2, 1976, he was admitted to the Ziekenhuis Vesalius Hospital in Antwerp. An emergency hemorrhoidectomy was performed on plaintiff at the hospital on the evening

of April 3, 1976. Plaintiff remained in the hospital until shortly before noon on April 5, 1976. Before and after the operation, plaintiff suffered severe physical pain and mental agony.

14. From the hospital, plaintiff went by a taxi directly to defendant's office in Antwerp, where he met and spoke with Jesse Williams, a welding superintendent. Williams was the supervisor for all of the welder foremen and pipeline welders who worked for defendant in the North Sea and was permanently stationed at the shore-based Antwerp office.

15. When plaintiff presented himself at defendant's office, he had with him and presented a "not fit for duty" slip given to him by the physician who had discharged him from the hospital. William refused to acknowledge that plaintiff's injury aboard the "Lay Barge 27" was work related, denied that defendant was liable for plaintiff's medical and hospital expenses, maintenance or unearned wages, and declined to furnish plaintiff transportation from Antwerp, Belgium, to his home in Houston, Texas. Such conduct of Williams, which was in the course and scope of his employment, constituted arbitrary, unreasonable, callous and willful disregard for plaintiff's rights by defendant.

16. Plaintiff was discharged from "Lay Barge 27" and from defendant's employ as of April 1, 1976. At the time of his discharge, plaintiff was incapacitated to work by reason of the injuries he received on board the "Lay Barge 27" on that date. Although plaintiff appeared and demanded his wages from the defendant after the date of his discharge, defendant failed to pay plaintiff his earned wages, unearned wages, maintenance and cure,

repatriation expense, and the value of his lost personal effects, as above mentioned.

17. Plaintiff left Antwerp, Belgium, on April 5, 1976, and arrived in Houston, Texas, on April 6, 1976. He was examined by Ernest Max, M.D., a colon and rectal surgeon, in Houston, Texas, on April 6, 14, and 28, 1976. On April 28, 1976, Dr. Max signed a written statement that plaintiff could resume work on May 3, 1976. Plaintiff was fit for duty on May 3, 1976; the parties have so stipulated. He had reached maximum medical recovery by that time.

18. Plaintiff was disabled for a period beginning April 1, 1976, and ending May 3, 1976. Plaintiff is due maintenance for thirty-two days. The parties have stipulated to a rate of $15.00 per day as maintenance. Such stipulation is reasonable and the rate is appropriate. The parties have also stipulated that plaintiff paid $200.00 as medical expenses in Antwerp and Houston. Defendant has paid for all other medical expenses of plaintiff from this injury.

19. Plaintiff's employment agreement with defendant provided that defendant would deduct $137.50 from each of the employee's first four pay checks to provide transportation funds to plaintiff's home, should the employee voluntarily terminate his employment prior to satisfactory completion. Defendant deducted and retained three payments of $137.50 each, a total of $412.50, from the three bi-weekly checks received by the plaintiff during March and April of 1976. When plaintiff left Antwerp, Belgium, for Houston, Texas, he was not given the money for repatriation expense which had been deducted and retained

by the defendant, but, instead, was required to pay his own expenses home.

20. Defendant retained $412.50 earned wages due to plaintiff, in addition to refusing to reimburse plaintiff for his out-of-pocket expenses incurred in returning home. Although he has repeatedly demanded to be reimbursed for his return expenses incurred, his demand has been ignored by defendant. Defendant's failure to pay plaintiff the $412.50 in earned wages was without sufficient cause.

21. Plaintiff has exercised due diligence to attempt to collect earned and unearned wages, maintenance and cure, repatriation expenses, and the value of lost personal effects which is due him. Defendant did not begin a thorough investigation of plaintiff's claim until September 30, 1976. The investigation was not made with reasonable diligence. Defendant's failure to pay maintenance and cure, repatriation expenses, the cost of his personal effects, and earned and unearned wages to plaintiff constituted arbitrary, unreasonable, callous, and willful disregard of plaintiff's rights. Defendant's recalcitrance in failing properly to pay plaintiff's claim has forced plaintiff "to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old." *Vaughan v. Atkinson,* 369 U.S. 527, 531 (1963). Defendant should have made the payments voluntarily and without delay.

22. During the period from April 2, 1976, through April 7, 1976, inclusive, defendant paid plaintiff $511.02.

23. The evidence disclosed that, on some occasions when employees of defendant are required to leave the

barge on account of illness or for personal reasons, they are permitted by defendant to terminate their employment and receive (1) their contractual annual bonus of ten percent on straight time pay earned to the date of termination and (2) their contract completion bonus of sixteen and two-thirds percent of earned straight time pay. The terms of the contract provide that such bonuses are not payable unless the employment term is completed by the employee. Defendant did not offer, and plaintiff did not request, a "job completion" termination of plaintiff's employment contract.

24. Plaintiff began working as a welder for Viking Offshore Services on May 5, 1976.

25. The pipeline project that "Lay Barge 27" was assigned to perform was completed by September 15, 1976. Plaintiff's employment with defendant would have been terminated on or before September 15, 1976, had he not become ill and been discharged by defendant.

26. Plaintiff was employed by defendant's parent company, J. Ray McDermott & Co., Inc., on October 7, 1976, as a pipeline welder working in the Gulf of Mexico, at the rate of $10.75 an hour.

27. The parties have stipulated that plaintiff's air fare from Antwerp, Belgium, to Houston, Texas was $600.00. They have also stipulated that the value of plaintiff's lost personal effects was $1,595.00.

28. For the pain and suffering which plaintiff endured by reason of his injuries referred to above, plaintiff is entitled to damages in the amount of $5,000.00.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and the subject matter of this action.

2. Plaintiff's first cause of action is brought as the result of his personal injuries received while in the service of "Lay Barge 27". As a seaman injured in the service of his vessel, "Lay Barge 27", plaintiff is entitled to all of the protections and remedies afforded by the Jones Act, 46 U.S.C. § 688, and the general maritime law of the United States.

3. As his second cause of action, plaintiff seeks to recover earned and unearned wages due and unpaid, maintenance and cure, the value of personal effects left on the barge, repatriation expenses, and penalty wages under 46 U.S.C. § 596.

4. At all times material to this action, "Lay Barge 27" was a vessel in navigation, and plaintiff was a member of its crew.

5. An absolute and non-delegable duty is imposed on the owner of a vessel in navigation to furnish a vessel reasonably safe and fit for its intended purpose. *E.g., Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960); *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85 (1946); *Webb v. Dresser Industries*, 536 F.2d 603 (5th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); *White v. Rimrock Tidelands, Inc.*, 414 F.2d 1336 (5th Cir. 1969). The shipowner's duty to maintain a seaworthy vessel is absolute, and a cause of action for breach of that duty arises even though the unseaworthy condition was unknown to the owner. *E.g., Webb v. Dresser Industries, supra.* The obligation includes the duty to provide a crew

fit in numbers, ability and disposition. *See, e.g., Usner v. Luchenback Overseas Corporation,* 400 U.S. 494 (1971); *Boudoin v. Lykes Brothers Steamship Co., Inc.,* 348 U.S. 336 (1955); *Clevenger v. Star Fish & Oyster Co.,* 325 F.2d 397 (1963). The shipowner is absolutely liable for injuries to a seaman caused by an unseaworthy condition on the vessel. *E.g., Mitchell v. Trawler Racer, Inc., supra.* It does not matter that the condition of unseaworthiness may be transitory. *Mitchell v. Trawler Racer, Inc., supra.*

6. The accident which occurred on April 1, 1976, and which forms the basis of plaintiff's claim, was proximately caused by the failure of the defendant to maintain a crew competent in both numbers and skill on board "Lay Barge 27" at all times. This failure on the part of the defendant was a breach of the shipowner's absolute and nondelegable duty to maintain a vessel fit for its intended purpose at all times and rendered "Lay Barge 27" unseaworthy.

7. Plaintiff was forced to leave the service of the vessel "Lay Barge 27" solely because of the disability caused by his injuries from the accident of April 1, 1976. As the result of the personal injuries plaintiff received on April 1, 1976, he suffered physical pain and mental anguish, for which he is entitled to be compensated by defendant in the amout of $5,000.00.

8. A seaman is entitled to recover maintenance and cure whenever he is disabled in the service of the ship. *The Osceola,* 189 U.S. 158 (1903). The obligation to provide maintenance and cure is an incident of the employment contract and extends during the period when the seaman is incapacitated to do a seaman's work and continues until he reaches maximum medical recovery.

Calmar Steamship Corp. v. Taylor, 303 U.S. 525 (1938); *Vaughan v. Atkinson,* 369 U.S. 527 (1962). Plaintiff is entitled to recover maintenance from April 1, 1976, the date of plaintiff's injury and the date plaintiff left "Lay Barge 27", through May 3, 1976, the day he was found fit for duty and had reached maximum medical recovery, a period of thirty-two days, at the rate of $15.00 a day. The total maintenance due plaintiff is $480.00. The plaintiff is also entitled to recover the sum of $200.00 that he paid as medical expenses in Belgium and the United States.

9. A seaman disabled in the service of the ship is entitled to recover wages, usually referred to as "lost wages" or "unearned wages' to the end of the voyage, *The Osceola,* 189 U.S. 158 (1903), or for the period of time contemplated by his employment contract or until he has reached the maximum medical cure and can work, whichever occurs first. *Vickers v. Tumey,* 290 F.2d 426 (5th Cir. 1961); *Martinez v. Star Fish & Oyster Co., Inc.,* 386 F. Supp. 560 (S.D. Ala. 1974); *Cassidy v. Steamship American Falcon,* 280 F. Supp. 663 (E.D. La. 1968); *Warren v. U.S.,* 75 F. Supp. 836 (D. Mass. 1948). Plaintiff is entitled to recover: unearned wages from April 2 (the first day after his injury for which he was not paid full wages) until May 3, 1976 (the date he was found fit for duty by Dr. Max), a period of thirty-one days. Unearned wages shall be calculated at a rate of $101.20 per day, *i.e.,* his straight-time wage as a pipeline welder, plus one-thirtieth of his expatriation bonus. The $511.02 paid plaintiff during the period April 2, 1976, to April 7, 1976, shall be deducted from the unearned wages due plaintiff. The total unearned wages due plaintiff, after deduction, is $2,626.18.

10. Plaintiff is entitled to recover all earned wages through the date of his discharge, *i.e.*, the $412.50 withheld from plaintiff's wages to cover return travel expenses.

11. Defendant's failure to promptly pay plaintiff the $412.50 withheld from his earned wages constitutes a withholding of wages without sufficient cause, which is prohibited by 46 U.S.C. § 596. Plaintiff is entitled to recover a penalty from defendant for the wrongful withholding of earned wages pursuant to such statute. The period during which the penalty runs is to be determined by the sound discretion of the district court and depends on the equities of the case. *Carribean Federation Lines v. Dahl,* 315 F.2d 370 (5th Cir.), *cert. denied,* 375 U.S. 831 (1963); *Ventiadis v. C. J. Thibodeaux & Co.,* 295 F. Supp. 135 (S.D. Tex. 1968). *Accord, Prindes v. S. S. African Pilgrim,* 266 F.2d 125 (4th Cir. 1959). *Contra, Escoba v. S. S. Washington Trader,* 503 F.2d 271 (9th Cir. 1974), *vacated and remanded on other grounds,* 423 U.S. 1070 (1976); *Swain v. Isthmian Lines, Inc.,* 360 F.2d 81 (3d Cir. 1966). The aim of 46 U.S.C. § 596 is to protect seamen from the harsh consequences of arbitrary and unscrupulous actions of their employers. *American Foreign Steamship Co. v. Matise,* 423 U.S. 150 (1975); *Collie v. Ferguson,* 281 U.S. 52 (1930). On the facts of this case, the appropriate period for imposition of the statutory penalty is from the date of discharge through the date of plaintiff's reemployment, *i.e.*, from April 1, 1976, to May 5, 1976, a period of thirty-four days. The wage rate to be used for computing the penalty is that for straight-time wage as a pipeline welder, plus one-thirtieth of the expatriation bonus, *i.e.*, $101.20. The penalty due plaintiff from defendant is $202.40 per day for thirty-four days, a total of $6,881.60.

12. Plaintiff is entitled to recover the sum of $600.00 he expended for air fare from Antwerp, Belgium, to Houston, Texas, after he was discharged. He is also entitled to recover the sum of $1,595.00, to reimburse him for personal effects left on board "Lay Barge 27" when he was discharged.

13. The award of prejudgment interest in an admiralty action is addressed to the sound discretion of the district court. *E.g., Scola v. Boat Frances R., Inc.*, No. 79-1169 (1st Cir. March 25, 1980); *Howell v. Marmpegaso Compania Naviera*, 578 F.2d 87 (5th Cir. 1978); *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978); *Brown v. Aggie & Millie, Inc.*, 485 F.2d 1293 (5th Cir. 1973). *See generally, Annot.*, 34 A.L.R. Fed. 126 (1977). An award of prejudgment interest is the rule and should be denied only under certain peculiar circumstances not present in this case. *E.g., McCormack v. Noble Drilling Corp.*, 608 F.2d 169 (5th Cir. 1979); *Dow Chemical Co. v. M/V Gulf Seas*, 593 F.2d 613 (5th Cir. 1979). Although a federal court sitting in admiralty is not bound by the interest rate set by state law, consideration of it is proper. *Sabine Towing & Transportation Co., Inc. v. Zapata Ugland Drilling, Inc.*, 553 F.2d 489 (5th Cir.), *cert. denied*, 434 U.S. 855 (1977); *Geotechnical Corporation of Delaware v. Pure Oil Co.*, 214 F.2d 476 (5th Cir. 1954). The judgment rate of interest in Texas is nine percentum per annum. TEX. REV. CIV. STAT. ANN. art. 5069-1.05 (Vernon 1971), as amended. Neither plaintiff nor defendant presented any evidence justifying a different rate of interest. Under the circumstances of this case, plaintiff is entitled to prejudgment interest at the rate of nine percentum per annum from April 1, 1976, the date of plaintiff's injury

and discharge, to the date of judgment on $5,913.68, the total recovery for maintenance, cure, repatriation expense, the cost of lost personal effects and earned and unearned wages. The prejudgment interest due plaintiff totals $2,506.89.

14. Because defendant's failure to pay maintenance, cure, repatriation expenses, the cost of lost personal effects, and earned and unearned wages was the result of recalcitrant conduct and arbitrary, unreasonable, callous, willful, and wanton disregard of plaintiff's rights, and because of defendant's failure to investigate plaintiff's claim with due diligence, plaintiff is entitled to attorney's fees. *Vaughan v. Atkinson,* 369 U.S. 527 (1962); *Lirette v. K & B Boat Rentals, Inc.,* 579 F.2d 968 (5th Cir. 1978). An attorney's fee of forty per centum of these items of recovery, including plus prejudgment interest (which is the rate provided by plaintiff's agreement with counsel), is reasonable under the circumstances. The amount of the attorney's fees due plaintiff is $3,368.23.

15. Because plaintiff did not intentionally misrepresent or conceal any material medical facts the disclosure of which was plainly desired, he is not barred from recovery by his failure to disclose his prior history of hemorroids. *McCorpen v. Central Gulf Steamship Corp.,* 396 F.2d 547 (5th Cir.), *cert. denied,* 393 U.S. 894 (1968).

16. Costs shall be taxed against defendant.

SIGNED and ENTERED this 6th day of May, 1980.

/s/ WM. WAYNE JUSTICE
Chief Judge

APPENDIX III

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 80-1599

Summary Calendar

D. C. Docket No. CA-S-78-26

DANNY L. GRIFFIN,
Plaintiff-Appellant,

versus

OCEANIC CONTRACTORS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

Before BROWN, POLITZ and TATE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

June 17, 1981

Issued As Mandate: Jul. 9, 1981

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-1599
Summary Calendar

DANNY L. GRIFFIN,
Plaintiff-Appellant,

versus

OCEANIC CONTRACTORS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

(JUNE 17, 1981)

Before BROWN, POLITZ and TATE, Circuit Judges.
TATE, Circuit Judge.

The plaintiff, Danny Griffin, was injured on a vessel while in the employ of the defendant, Oceanic Contractors, Inc. He brought suit against his employer seeking damages under the Jones Act, 46 U.S.C. § 688, the general maritime law of the United States, and for penalty wages under 46 U.S.C. § 596.[1]

1. 46 U.S.C. § 596 provides:
The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within

After a judge trial on the merits, the trial court found that Griffin's injury was caused by an unseaworthy condition of the vessel, and accordingly awarded him an amount totalling $23,670.40. On appeal, Griffin contends that this award was insufficient due to the trial court's error (1) for failure to award him lost wages for his entire contractual term, (2) for failure to include any bonus and/or overtime pay in the computation of earned and/or unearned wages, and (3) for failure to properly apply the penalty wage statute, 46 U.S.C. § 596.

Facts

Plaintiff Griffin signed an employment contract on February 18, 1976, with the defendant, Oceanic Contractors, Inc. [hereinafter "Oceanic"], agreeing to work as a senior pipeline welder on defendant's vessels operating in the North Sea. The contract stipulated that his employment would commence "on the date of [his] departure and will continue . . . until December 15, 1976 or until Oceanic's 1976 pipeline committal in North Sea is fulfilled whichever shall occur first."

Griffin shortly thereafter flew to Antwerp, Belgium, and reported to the vessel, Lay Barge 27, which was tied

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four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts.

up in the harbor for winter repairs. On April 1, 1976, in getting the barge ready to put to sea, Griffin developed traumatic thrombosed hemorrhoids when he attempted to move an empty oxygen bottle by himself.

On April 3, 1976, emergency surgery was performed on Griffin at a hospital in Antwerp, where he remained until April 5, 1976. On April 6, 1976, he flew back to his home in Houston, Texas, and was there examined by Dr. Ernest Max, a colon and rectal surgeon, on April 6, 14 and 28, 1976. Griffin reached maximum medical recovery *and* was found fit to return to duty on May 3, 1976.

Griffin brought suit against Oceanic under the Jones Act, general maritime law, and 46 U.S.C. § 596, for its failure to pay maintenance and cure, repatriation expenses, and earned and unearned wages. The trial court found that the vessel was unseaworthy due to an insufficient number of the crew members, and that Griffin's injury resulted from this unseaworthy condition (because he had no aid in moving the oxygen bottle.)

The trial court awarded the damages totalling $23,670.40 to Griffin, as follows: (1) $5,913.68, as recovery for maintenance and cure, earned and unearned wages, repatriation expense and the value of lost personal effects; (2) $2,506.89, as prejudgment interest on the recovery for maintenance and cure, earned and unearned wages, repatriation expense, and the value of lost personal effects; (3) $3,368.23, as attorney's fees for the recovery for maintenance and cure, earned and unearned wages, repatriation expense and prejudgment interest; (4) $5,000.00, as recovery for pain and suffering and penalty wages; and (5) $6,881.60 as penalty wages.

Griffin's appeal questions only the refusal of the trial court to allow him full wages (straight time, overtime, and bonuses) for the entire period of his contractual employment (the trial court limited the wage-recovery to the period of disability), and its failure to award him the full statutory penalty, 46 U.S.C. § 596 (quoted at note 1), of double-daily wages for each day until the time of actual payment in 1980 of the unpaid wages earned in 1976 (the trial court awarded him double the daily rate of straight time wages for the 34-day period of unemployment during 1976, or a total of $6,881.60).

I

The trial court allowed Griffin to recover unearned wages from the day after his injury, April 2, to the date he was found fit for duty by Dr. Max, May 3, 1976. On appeal, Griffin urges that the trial court committed an error of law in not awarding him unearned wages until the ending date of his contractual period of employment, which in this instance was September 15, 1976, the date on which Oceanic's pipelaying season was completed in the North Sea.

Griffin advances three separate theories upon which he should recover unearned wages from April 1 to September 15: (1) under the general maritime law (as part of his claim for maintenance, wages, and cure); (2) as general damages under the Jones Act; and (3) under a breach of contract theory.

We find all three to be inapplicable to the facts before us.

The right of an injured seaman to recover unearned maintenance-wages-cure (M-W-C) wages under the gen-

eral maritime law of the United States until either (1) the end of the voyage or (2) the end of the contractual period of employment is well established. *See, e.g.,* The Osceloa,, 189 U.S. 158, 175, 23 S.Ct. 483, 487 (1903); Isthmian Lines v. Hare, 334 F.2d 521 (5th Cir. 1964); Vickers v. Tumey, 290 F.2d 426, 434 (5th Cir. 1961); Rofer v. Head & Head, Inc., 226 F.2d 927, 929 (5th Cir. 1955); 2 M. Norris, The Law of Seamen 17 § 544, p. 17 (3d ed. 1970). However, if the seaman recovers from the injury and is fit to return to duty prior to the termination of the voyage or his contractual period, then he is not entitled to continue to receive M-W-C wages past that point.[2] *See* Vickers v. Tumey, *supra,* 290 F.2d at 434-435; Martinez v. Star Fish and Oyster Co., 386 F.Supp. 560, 564 (S.D. Ala. 1974); Warren v. United States, 75 F.Supp. 836, 838 (D.C. Mass. 1948).

As Griffin contends, lost wages may also form an element of damages in a suit brought under the Jones Act. *See* Vickers v. Tumey, *supra,* 290 F.2d at 434. Nevertheless, even under the Jones Act (under which a plaintiff may recover for loss of future earnings after the termination of voyage or contract), Griffin is not allowed to recover for lost wages past May 3, 1976, because he was found to have fully recovered as of that date and was found to have incurred no diminution of future earnings as a result of his injury. Any decrease

2. In Warren v. United States, 75 F. Supp. 836, 838 (D.C. Mass. 1948), the court found that a seaman was entitled to M-W-C wages "until the time the seaman is not only well but able to find suitable employment." For purposes of the present case, we pretermit discussion of whether a seaman has to be both fit for duty and able to find suitable employment in order for M-W-C wages to be terminated, for here the trial court found as a fact that Griffin had accepted new employment on May 5, 1976, just two days after he was pronounced fit for duty.

in earnings after May 3 was due to Griffin's failure to return to work for Oceanic, not from his injury, since Oceanic (see below) held his position open for him.

Finally, Griffin contends he is due unearned wages through September 15, 1976, because the defendant breached his employment contract by wrongfully discharging the defendant on April 1, 1976. The trial court did indeed find that Griffin was discharged effective April 1, but it failed to state that such a discharge constituted a breach of contract. Although notice was sent to Griffin that his discharge was effective April 1, such notification was not transmitted until June 2 (after unsucessful efforts to contact Griffin and discover when he would return to work) (Def. Ex. 11, 12, Tr. 364-67), and the evidence in the record establishes that Griffin's job was held open until at least June 1, 1976 (Def. Ex. 12), that he made no effort to return to work for Oceanic (indeed, he obtained new employment on May 5), and that Oceanic made numerous attempts to contact Griffin for the purpose of re-employment.[3]

II

The plaintiff also contends that the trial court erred in not awarding him (1) bonus pay for the period prior to his injury and (2) bonus and overtime pay for the period between April 2 and May 3.

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3. The district court did not make an express finding as to the nonbreach of contract, but under the virtually uncontradicted evidence, any finding of breach would have been clearly erroneous, so the issue may be reviewed by us without remand. See Kratzer v. Capital Marine Supply, Inc., ____ F.2d ____, ____ (5th Cir. 1981) (sl. op. p. 7218, 7225, May 20, 1981).

We disagree. Griffin's contract provided for (1) an annual bonus and (2) a contract-completion bonus. The trial court found that "the terms of the contract provide that such bonuses are not payable unless the employment term is completed by the employee." Since the employment term was not completed, we do not find that the trial court was clearly erroneous in not including a proportionate amount of these bonuses in computing Griffin's unearned wages, either on a contract theory or as Jones Act wage damages.

Furthermore, the district court did not include any overtime pay for the period between April 2 and May 3. Again, we cannot say that the district court erred. The actual amount of overtime was uncertain, and hence any inclusion of such would have been purely speculative. *See* Martinez v. Star Fish and Oyster Co., 386 F. Supp. at 564; Keefe v. American Pacific Steamship Co., 110 F. Supp. 853, 856 (S.D. Cal. 1953).

III

The district court found that Oceanic's failure to promptly pay $412.50 withheld from wages already earned by Griffin constituted a withholding of wages without sufficient cause. Under 46 U.S.C. § 596, Griffin was entitled to recover a penalty for this wrongful withholding. The statutory penalty requires payment of a penalty of (twice the daily wage rate for each) to the seaman until he is actually paid (see note 1 for statutory text), which in his case was not until September, 1980, after the judgment below. The trial court computed this penalty, however, by doubling Griffin's daily straight-time wage only for the period from April 1, 1976 to May 5, 1976, the date of his re-employment.

Griffin contends that the trial court erred in so applying the wage penalty only from April 1 through May 5, 1976, arguing that it should have been awarded for each day during which the failure to pay continued, a period not ending until September, 1980.

In this circuit, the duration on applying the wage penalty statute (46 U.S.C. § 596) is left to the sound discretion of the district court. Caribbean Federation Lines v. Dahl, 315 F.2d 370, 374 (5th Cir.), cert. den., 375 U.S. 831 (1963). Ventiadis v. C. J. Thibodeaux & Co., 295 F.Supp. 135, 138 (D.C. Tex. 1968).[4] Absent any abuse, we do not disturb the trial court's order.

Here, after considering the equities involved, the trial court granted Griffin penalty wages only for the period

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4. The plaintiff Griffin accurately states that other circuits view § 596 as establishing a mandatory time period for its application. However, the Supreme Court in American Foreign S.S. Co. v. Matise, 423 U.S. 150, 152 n.1, 96 S.Ct. 410, 312 n.1 (1975) recently noted this circumstance and also that the Fifth Circuit view as to the discretionary time period application is shared by a majority of circuits that have considered the issue:

> While the Third and Ninth Circuits have found that the trial judge has no discretion in determining the amount of the penalty under § 596, Swain v. Isthmian Lines, Inc., 360 F.2d 81 (CA 3 1966); Escobar v. S.S. Washington Trader, 503 F.2d 271 (CA 9 1974), cert. pending sub nom. American Trading Transp. Co. v. Escobar, No. 74-1184, the First, Second, Fourth, and Fifth Circuits have concluded that the length of time to which the penalty applies—and hence its amount—is subject to the discretion of the District Court. Mavromatis v. United Greek Shipowners Corp., 179 F.2d 310 (CA 1 1950); Forster v. Oro Navigation Co., 228 F.2d 319 (CA 2 1955), aff'g 128 F. Supp. 113 (S.D.N.Y. 1954); Southern Cross S.S. Co. v. Firipis, 285 F.2d 651 (CA 4 1960), cert. denied, 365 U.S. 869, 81 S.Ct. 903, 5 L.Ed.2d 859 (1961); Caribbean Federation Lines v. Dahl, 315 F.2d 370 (CA 5 1963).

Under the precedential rule of this circuit, until it is overruled by en banc opinion, this panel is bound by prior circuit precedent.

during which he was actually not employed. We are unable to state that the district court abused its discretion by so doing.

Conclusion

In summation, we find that the trial court neither abused its discretion nor committed any error of law in the computation of the damage award granted to plaintiff Griffin. We, therefore, AFFIRM the decision of the trial court.

AFFIRMED.

APPENDIX IV

46 U.S.C. § 596

The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seaman of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts. R.S. § 4529; Dec. 21, 1898, c. 28, §§ 4, 26, 30, Stat. 756, 764; Mar. 4, 1915, c. 153, § 3, 38 Stat. 1164.

Joint Appendix

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FILED
JAN 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DANNY L. GRIFFIN,
Petitioner,

v.

OCEANIC CONTRACTORS, INC.,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed September 14, 1981
Certiorari Granted November 16, 1981

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STATUTE INVOLVED

46 U.S.C. § 596

The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seaman of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts. R.S. § 4529; Dec. 21, 1898, c. 28, §§ 4, 26, 30, Stat. 756, 764; Mar. 4, 1915, c. 153, § 3, 38 Stat. 1164.

RELEVANT DOCKET ENTRIES

2-3-78 PLAINTIFF'S ORIGINAL COMPLAINT

5-11-79 ORIGINAL ANSWER OF DEFENDANT OCEANIC CONTRACTORS, INC.

10-29-79 OMNIBUS ORDER dated 10-25-79. Case set for Final Pre-Trial on February 28 or 29, 1980 and for Trial on March 7, 1980. WWJ

2-28-80 FINAL PRE-TRIAL HEARING HELD. Case to take one day to try. Objections to deposition testimony to be filed by Thursday of next week. Court admonished attorneys for the way the pre-trial order was prepared. Supplemental Pre-Trial Order to be prepared and filed.

3-13-80 CASE TO TRIAL at 9:15 a.m. Opening remarks waived. Plaintiff's Motion for Protection taken up. Court had the Courtroom Clerk state for the record a telephone conversation had with Plaintiff's counsel regarding whether or not he intended to urge his Motion to Compel. Plaintiff's counsel stated he agreed with the statement made by the Courtroom Deputy that he would advise within the next few days if he desired to urge the motion and that no word was received from him. Mr. Chaffin said he had not seen all the documents requested and was not sure of their contents. Counsel for Defendant said he had no knowledge of this dispute until he was

handed the motion yesterday. Court refused to make a credibility choice between attorneys and said if he found the Plaintiff was prejudiced he would entertain further testimony. All exhibits listed in the Final Pre-Trial Order were received in evidence. Defendant stated its objection to Pltf's Exhibits Nos. 29 and 30. Court stated since this is a bench trial, the objection would be overuled.

5-7-80 FINDINGS OF FACT AND CONCLUSIONS OF LAW. WWJ V35 p. 83 (dated May 6, 1980)

5-7-80 JUDGMENT dated May 6, 1980. Plaintiff to recover from Defendant the sum of $23,670.-40. The total amount of this judgment, including attorney's fees, *i.e.*, $23,670.40, shall bear interest at the rate of 9% per annum from the date of this judgment until paid, and that Defendant shall pay all costs of court. WWJ V35 p.84

6-2-80 PLAINTIFF'S NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

C.A. NO. S-78-26-CA
[Filed Pursuant to F.R.C.P. 9(h)]

DANNY L. GRIFFIN

vs.

J. RAY McDERMOTT & CO., INC. and
OCEANIC CONTRACTORS, INC.

PLAINTIFF'S ORIGINAL COMPLAINT

1. This action is brought pursuant to F.R.C.P. 9(h) as a claim in admiralty.

2. Plaintiff is a resident citizen of Houston, Texas.

3. Defendant, J. RAY McDERMOTT & CO., INC., is a corporation, which may be served with process by serving its registered agent for service of process, C T Corporation System, 811 Dallas Avenue, Houston, Texas.

Defendant, OCEANIC CONTRACTORS, INC., is a corporation, which may be served with process by serving its registered agent for service of process, Mr. R. K. Ritchie, 1010 Common Street, 24th Floor, New Orleans, Louisiana.

4. At all times material hereto, Defendant, OCEANIC CONTRACTORS, INC., operated as the alter ego of Defendant, J. RAY McDERMOTT & CO., INC.

5. At the time of the occurrence made the basis of this action, DANNY L. GRIFFIN was a Jones Act seaman

who was entitled to all of the protections of the Jones Act as enumerated therein. As a Jones Act Seaman, Plaintiff brings this cause of action under 28 U.S.C. § 1916, without the necessity for prepayment of costs or the necessity of depositing security therefor.

6. This action is brought within the purview of 46 U.S.C. § 688, hereinafter referred to as the Jones Act, and for breach of the shipowner's warranty to maintain a seaworthy vessel. Plaintiff would show that during the time period February 1976 through April 1976, he received serious and disabling injuries in the course and scope of his employment while serving on board the vessel "Lay Barge No. 27". The injuries which your Plaintiff received and herein complains of were proximately caused by and resulted solely through the negligence of the Defendants, their master, agents, servants and employees and/or because of the unseaworthiness of the aforementioned vessel.

7. Plaintiff would further show that the Defendants, their master, agents, servants and employees, were negligent and the aforementioned vessel was unseaworthy in the following respects, to-wit:

a. Failure to supply Plaintiff with a sufficient number of competent co-employees by failing to provide Plaintiff, a welder, with a sufficient number of competent welder's helpers, to assist Plaintiff in lifting and moving heavy objects, thus causing Plaintiff to develop a serious hemorrhoid condition.

b. Failure to supply the Plaintiff with a safe place to work.

c. Failure to properly outfit the vessel upon which Plaintiff was serving with the necessary equip-

ment, personnel and devices with which to properly perform the duties to which Plaintiff was assigned.

d. The actions of Plaintiff's supervisors were negligent in that they failed to use ordinary and prudent care in ordering the Plaintiff to perform the duties which resulted in the injuries complained of herein.

8. Plaintiff would show that by reason of the injuries sustained as a result of the accident which occurred during the time period February 1976 through April 1976, he has suffered serious and disabling injuries. As a result of said injuries, Plaintiff has suffered the loss of earnings in the past, and the disability from which Plaintiff now suffers and will, in all reasonable medical probability, continue to suffer for the rest of his life has caused his earning capacity to be permanently and materially diminished. In addition, Plaintiff has suffered great physical pain and mental anguish in the past and, in all reasonable medical probability, will continue to suffer on a permanent basis great physical pain and mental anguish. Furthermore, as a result of the injuries which your Plaintiff sustained he has been afflicted with a substantial degree of physical impairment which, in all reasonable medical probability, is permanent. Plaintiff has also been forced to incur expenses for medical and hospital care as a direct result of the injuries complained of herein and, in all reasonable medical probability, as a result of the injuries complained of herein Plaintiff will continue to incur medical and hospital expenses for the remainder of his lifetime. By reason of the foregoing, Plaintiff has been damaged by the Defendants in an amount greater than the jurisdictional limits of this Court.

9. At all times material hereto, your Plaintiff was a Jones Act Seaman and, as such, he is entitled to all of the protections and remedies enumerated under the Jones Act. Defendants are, therefore, liable to your Plaintiff to pay maintenance and cure to Plaintiff as the result of injuries received on the "Lay Barge 27". Defendants have failed and neglected to honor their obligations to Plaintiff to pay the expenses of his maintenance and cure while incapacitated as a result of the injuries complained of herein.

10. Further, Plaintiff would show that although demand has been made upon the Defendants to pay the Plaintiff the maintenance and cure that is properly due and owing him under law, Defendants without just cause have wholly failed and refused to pay Plaintiff the maintenance and cure to which he is legally entitled. Defendants' refusal to pay has not had any basis in law or in fact, and Defendants have not asserted and do not now assert that Plaintiff did not become disabled while in service of the aforementioned vessel. By reason of the foregoing, your Plaintiff has been required to obtain legal counsel to assist him in collecting sums which are rightfully due him as maintenance and cure, and has obligated himself to pay reasonable attorneys' fees for legal services rendered in regard to the collection of maintenance and cure which is rightfully due your Plaintiff. Plaintiff herein prays that upon final trial of this cause, Defendants be ordered to pay all maintenance and cure due and owing him, together with interest thereon, and a reasonable attorneys' fee to the undersigned counsel for legal counsel and assistance rendered in collecting said maintenance and cure.

11. In addition to the damages of which Plaintiff has heretofore complained, Plaintiff has been refused payment

of earned wages. Under applicable provisions of the Jones Act, Plaintiff is entitled to recover earned wages due and owing to him.

12. Plaintiff has also been refused payment of wages until the end of the voyage of the aforementioned vessel, the ending date of said voyage being currently unknown to Plaintiff. Such wages until the end of the voyage are rightfully due and owing to Plaintiff.

13. Defendant has refused and neglected, and still refuses and neglects, without sufficient cause, to pay Plaintiff the wages due him. Plaintiff is entitled under applicable provisions of the Jones Act to receive the wages due him, and is further entitled to recover as wages a sum equal to two days' pay for each day during which payment of such sum is delayed. Plaintiff prays that, upon final trial of this cause, he be awarded all past due wages, interest on those wages until the date of judgment, and all amounts due him as penalties under applicable provisions of the Jones Act.

14. By reason of the foregoing, Plaintiff has been required to obtain legal counsel to assist him in collecting sums which are rightfully due him as wages, and he has obligated himself to pay reasonable attorney's fees for legal services rendered in regard to the collection of such sums. Plaintiff prays that, upon final trial of this cause, Defendants be ordered to pay, pursuant to the general maritime law, the Jones Act and Vernon's Annotated Civil Statutes, Article 2226, a reasonable attorney's fee to the undersigned counsel for legal assistance rendered in collecting said wages.

15. Plaintiff has been refused payment of his repatriation costs to which he become entitled by reason of his injury.

Plaintiff has been refused return of or payment for his personal effects that remained aboard the aforementioned vessel subsequent to his injury. Plaintiff prays that upon final trial of this cause he be awarded all costs of repatriation and the reasonable value of his personal effects that remained aboard the aforementioned vessel.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that process issue to be served upon the Defendants in the form and manner prescribed by law, requiring the Defendants to appear and answer herein, and that upon final trial hereof Plaintiff have judgment against the Defendants for all sums heretofore pleaded for, with interest thereon from date of trial, all costs of court, and all such other and further relief to which Plaintiff may be entitled and to which the court believes Plaintiff deserving, and for which Plaintiff now prays.

Respectfully submitted,

FRIEDMAN AND CHAFFIN

Robert A. Chaffin
3500 Travis
Houston, Texas 77002
(713) 528-4141
ATTORNEYS FOR PLAINTIFF

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared ROBERT A. CHAFFIN, known to me to be the person whose name is subscribed hereto, and who, being by me duly sworn, on oath deposed and said:

"I am the ROBERT A. CHAFFIN who is the attorney for Plaintiffs in the above styled and numbered cause. I have read the foregoing Plaintiffs' Original Complaint designed to be filed in the above styled and numbered cause, have personal knowledge of the facts and allegations contained therein, and every fact and allegation contained therein is true and correct."

_____
Robert A. Chaffin

SUBSCRIBED and SWORN TO before me this ____ day of _____, 1978, to certify which witness my hand and seal of office.

_____
Notary Public in and for
Harris County, TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

C. A. NO. S-78-26-CA

DANNY L. GRIFFIN,
Plaintiff

v.

OCEANICS CONTRACTORS, INC.,
Defendant

ANSWER OF DEFENDANT
OCEANIC CONTRACTORS, INC.

TO THE HONORABLE JUDGES OF SAID COURT:

NOW COMES, Oceanic Contractors, Inc., one of the defendants herein, and for answer to the complaint of Danny L. Griffin, plaintiff, would respectfully show as follows:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

Defendant admits the allegations contained in paragraphs 1 and 2 of the plaintiff's complaint; admits the allegations of paragraph 3 insofar as such allegations pertain to this defendant; admits the allegations of paragraph 6 of the complaint that on or about February, 1976 through April, 1976, the plaintiff was employed by

this defendant on Lay Barge No. 27, but denies the remaining allegations of said paragraph; denies the allegations of paragraphs 4, 5, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the complaint; and denies that plaintiff is entitled to the relief prayed for in the prayer of his complaint.

Third Defense

For further answer, defendant would show that if the plaintiff was injured, as alleged, which is not admitted but expressly denied, such injury, if any, was caused solely and proximately by his own negligent acts and conduct and his failure to use that degree of care for his own safety that a reasonably prudent person in the exercise of ordinary care would have used under the same or similar circumstances or, in the alternative, such failure on his part was a proximate cause of his injury, if any.

Fourth Defense

For further answer, defendant would show that if plaintiff was injured on the occasion in question, as alleged, which is not admitted but expressly denied, such injury was the result of an unavoidable accident.

Fifth Defense

For further answer, defendant would show that plaintiff's disability or incapacity, if any, was caused by some disease, condition of health, physical defect, injury and/or other cause or combination of causes unrelated in whole or in part to the alleged injury herein sued upon.

WHEREFORE, PREMISES CONSIDERED, defendant prays that the plaintiff take nothing by his suit, that

his complaint herein be dismissed, and that defendant have such other and further relief to which it may show itself justly entitled.

FULBRIGHT & JAWORSKI

By: _____

Theodore Goller
900 Bank of the Southwest Bldg.
Houston, Texas 77002
(713) 651-5151
Attorneys for Defendant, Oceanic Contractors, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing answer was served upon Mr. Robert A. Chaffin, Friedman and Chaffin, 3500 Travis, Houston, Texas 77002, attorney for plaintiff, by mailing a copy of same to him in a properly addressed, stamped envelope this _____ day of May, 1979.

_____

Theodore Goller

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

CIVIL ACTION NO. S-78-26

DANNY L. GRIFFIN

v.

OCEANIC CONTRACTORS, INC.

FINDINGS OF FACT

1. This civil action is brought by Danny Laried Griffin, as a seaman, against Oceanic Contractors, Inc. At all times material to this action, plaintiff was, and is now, a resident of the State of Texas, and defendant, Oceanic Contractors, Inc., was the owner and operator of "Lay Barge 27".

2. At all relevant times, plaintiff was a seaman, and the "Lay Barge 27" was a vessel in navigation. The "Lay Barge 27" is a special purpose vessel, designed and outfitted for the assembly and installation of marine pipelines.

3. On February 18, 1976, plaintiff signed an employment contract with defendant in New Orleans, whereby he agreed to work as a pipeline welder on board defendant's vessels operating in the North Sea. The employment contract specified that plaintiff's employment was to begin on the date plaintiff departed the United States and extend "until December 15, 1976, or until Oceanic's 1976 pipeline committal in the North Sea is fulfilled, whichever shall occur first." The employment contract also provided

that, for his work as a pipeline welder, plaintiff would receive a base pay rate of $9.65 per hour and an expatriation premium of $720.00 per month; that for his work as a structural welder, plaintiff would be paid $6.65 per hour and an expatriation premium of $495.00 per month.

4. On the same day the employment contract was signed, plaintiff reported to a physician, selected and paid by defendant, in New Orleans, Louisiana, for a physical examination. Plaintiff had had several minor episodes of hemorrhoids in the year preceding the examination. Plaintiff answered all questions asked by defendant's physician at the time of the physical examination. Defendant's physician did not ask plaintiff if he, plaintiff, had ever suffered from hemorrhoids; however, the doctor did examine plaintiff's rectum. The physical examination form states, directly above the space for plaintiff's signature: "I understand this is a limited examination and does not eliminate all possibilities of physical impairment or disease." In light of this provision, a reasonable interpretation of the physical examination form is, that defendant's physician was only interested in information specifically requested. Plaintiff did not intentionally misrepresent or conceal any material medical facts.

5. On March 7, 1976, defendant provided plaintiff with air transportation to Antwerp, Belgium. Upon arrival, plaintiff reported to the "Lay Barge 27", which was berthed in the harbor of Antwerp.

6. On the "Lay Barge 27", each welder was normally assigned a welder's helper, whose only task was to assist that welder in the performance of his duties. At the time of the accident made the basis of plaintiff's claims, "Lay Barge 27" was so shorthanded that only one welder's

helper was available for the ten to twelve welders assigned to each work shift.

7. The North Sea is a hostile and inclement body of water during the winter months. In order that "Lay Barge 27" would be ready to put to sea as early in the year as possible, defendant followed the practice of having barge crews on board approximately one month ahead of time, to repair damages from the previous year and to perform rigging and maintenance operations necessary to ready the barge for seagoing service. It was contemplated by defendant that, as soon as the barge was made ready by its crew and the North Sea was calmed, "Lay Barge 27" would put to sea and begin its pipe laying season.

8. Oxygen is essential to the welding process. It is usually supplied to welders in tubular metal tanks, called "oxygen bottles", weighing about 125 to 150 pounds. When a welder changes the location of his work, it is necessary to move the oxygen bottle he is using to the new site. It is also necessary to move oxygen bottles, in order to replace an empty one with a full one. Moving an oxygen bottle is a task ordinarily and normally assigned to a welder's helper. It is a difficult assignment, for the oxygen bottles have a smooth surface not conducive to lifting or moving. If an unobstructed passage is present, a bottle is commonly shifted by rolling it across the deck of the vessel; otherwise, it must be lifted across obstacles.

9. "Lay Barge 27" was shorthanded on and before April 1, 1976, as above set out, in that there were an insufficient numbers of welders' helpers available to assist the welders assigned to the vessel. On that day, plaintiff was engaged in repair and maintenance on the deck of

the "Lay Barge 27", which was much cluttered by pipes, machinery and other obstructions. When it became necessary for plaintiff to move an oxygen bottle, no welder's helper was at hand, and he, himself, attempted to lift and move the oxygen bottle. In performing this task, plaintiff so strained himself that he sustained traumatic thrombosed hemorrhoids, a painful and disabling injury.

10. The failure of defendant to maintain an adequately staffed vessel was a breach of its nondelegable duty to maintain a seaworthy vessel, for it is essential that a construction vessel such as the "Lay Barge 27" have on board at all times a crew that is qualified, both in skills and in numbers, to do the job at hand. "Lay Barge 27" was unseaworthy at the time of plaintiff's injury, in a manner that caused plaintiff's injury.

11. Plaintiff exercised his duties as a seaman properly on the occasion in question, and he was not guilty of contributory negligence.

12. April 1, 1976, was the last day plaintiff was aboard "Lay Barge 27" for the purpose of working.

13. The plaintiff left the barge on April 1, 1976, and sought medical attention from Dr. J. Stuyck, a physician in Antwerp, Belgium, to whom plaintiff was referred by a medic in defendant's employ. He was treated conservatively with local anesthetics and other prescriptions. He continued to have difficulty with his hemorrhoids, and on April 2, 1976, he was admitted to the Ziekenhuis Vesalius Hospital in Antwerp. An emergency hemorrhoidectomy was performed on plaintiff at the hospital on the evening of April 3, 1976. Plaintiff remained in the hospital until shortly before noon on April 5, 1976. Before and after

the operation, plaintiff suffered severe physical pain and mental agony.

14. From the hospital, plaintiff went by a taxi directly to defendant's office in Antwerp, where he met and spoke with Jesse Williams, a welding superintendent. Williams was the supervisor for all of the welder foremen and pipeline welders who worked for defendant in the North Sea and was permanently stationed at the shore-based Antwerp office.

15. When plaintiff presented himself at defendant's office, he had with him and presented a "not fit for duty" slip given to him by the physician who had discharged him from the hospital. Williams refused to acknowledge that plaintiff's injury aboard the "Lay Barge 27" was work related, denied that defendant was liable for plaintiff's medical and hospital expenses, maintenance or unearned wages, and declined to furnish plaintiff transportation from Antwerp, Belgium, to his home in Houston, Texas. Such conduct of Williams, which was in the course and scope of his employment, constituted arbitrary, unreasonable, callous and willful disregard for plaintiff's rights by defendant.

16. Plaintiff was discharged from "Lay Barge 27" and from defendant's employ as of April 1, 1976. At the time of his discharge, plaintiff was incapacitated to work by reason of the injuries he received on board the "Lay Barge 27" on that date. Although plaintiff appeared and demanded his wages from the defendant after the date of his discharge, defendant failed to pay plaintiff his earned wages, unearned wages, maintenance and cure, repatriation expense, and the value of his lost personal effects, as above mentioned.

17. Plaintiff left Antwerp, Belgium, on April 5, 1976, and arrived in Houston, Texas, on April 6, 1976. He was examined by Ernest Max, M.D., a colon and rectal surgeon, in Houston, Texas, on April 6, 14, and 28, 1976. On April 28, 1976, Dr. Max signed a written statement that plaintiff could resume work on May 3, 1976. Plaintiff was fit for duty on May 3, 1976; the parties have so stipulated. He had reached maximum medical recovery by that time.

18. Plaintiff was disabled for a period beginning April 1, 1976, and ending May 3, 1976. Plaintiff is due maintenance for thirty-two days. The parties have stipulated to a rate of $15.00 per day as maintenance. Such stipulation is reasonable and the rate is appropriate. The parties have also stipulated that plaintiff paid $200.00 as medical expenses in Antwerp and Houston. Defendant has paid for all other medical expenses of plaintiff from this injury.

19. Plaintiff's employment agreement with defendant provided that defendant would deduct $137.50 from each of the employee's first four pay checks to provide transportation funds to plaintiff's home, should the employee voluntarily terminate his employment prior to satisfactory completion. Defendant deducted and retained three payments of $137.50 each, a total of $412.50, from the three bi-weekly checks received by the plaintiff during March and April of 1976. When plaintiff left Antwerp, Belgium, for Houston, Texas, he was not given the money for repatriation expense which had been deducted and retained by the defendant, but, instead, was required to pay his own expenses home.

20. Defendant retained $412.50 earned wages due to plaintiff, in addition to refusing to reimburse plaintiff for his out-of-pocket expenses incurred in returning home. Although he has repeatedly demanded to be reimbursed for his return expenses incurred, his demand has been ignored by defendant. Defendant's failure to pay plaintiff the $412.50 in earned wages was without sufficient cause.

21. Plaintiff has exercised due diligence to attempt to collect earned and unearned wages, maintenance and cure, repatriation expenses, and the value of lost personal effects which is due him. Defendant did not begin a thorough investigation of plaintiff's claim until September 30, 1976. The investigation was not made with reasonable diligence. Defendant's failure to pay maintenance and cure, repatriation expenses, the cost of his personal effects, and earned and unearned wages to plaintiff constituted arbitrary, unreasonable, callous, and willful disregard of plaintiff's rights. Defendant's recalcitrance in failing properly to pay plaintiff's claim has forced plaintiff "to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old." *Vaughan v. Atkinson,* 369 U.S. 527, 531 (1963). Defendant should have made the payments voluntarily and without delay.

22. During the period from April 2, 1976, through April 7, 1976, inclusive, defendant paid plaintiff $511.02.

23. The evidence disclosed that, on some occasions when employees of defendant are required to leave the barge on acount of illness or for personal reasons, they are permitted by defendant to terminate their employment

and receive (1) their contractual annual bonus of ten percent on straight time pay earned to the date of termination and (2) their contract completion bonus of sixteen and two-thirds percent of earned straight time pay. The terms of the contract provide that such bonuses are not payable unless the employment term is completed by the employee. Defendant did not offer, and plaintiff did not request, a "job completion" termination of plaintiff's employment contract.

24. Plaintiff began working as a welder for Viking Offshore Services on May 5, 1976.

25. The pipeline project that "Lay Barge 27" was assigned to perform was completed by September 15, 1976. Plaintiff's employment with defendant would have been terminated on or before September 15, 1976, had he not become ill and been discharged by defendant.

26. Plaintiff was employed by defendant's parent company, J. Ray McDermott & Co., Inc., on October 7, 1976, as a pipeline welder working in the Gulf of Mexico, at the rate of $10.75 an hour.

27. The parties have stipulated that plaintiff's air fare from Antwerp, Belgium, to Houston, Texas was $600.00. They have also stipulated that the value of plaintiff's lost personal effects was $1,595.00.

28. For the pain and suffering which plaintiff endured by reason of his injuries referred to above, plaintiff is entitled to damages in the amount of $5,000.00.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and the subject matter of this action.

2. Plaintiff's first cause of action is brought as the result of his personal injuries received while in the service of "Lay Barge 27". As a seaman injured in the service of his vessel, "Lay Barge 27", plaintiff is entitled to all of the protections and remedies afforded by the Jones Act, 46 U.S.C. § 688, and the general maritime law of the United States.

3. As his second cause of action, plaintiff seeks to recover earned and unearned wages due and unpaid, maintenance and cure, the value of personal effects left on the barge, repatriation expenses, and penalty wages under 46 U.S.C. § 596.

4. At all times material to this action, "Lay Barge 27" was a vessel in navigation, and plaintiff was a member of its crew.

5. An absolute and non-delegable duty is imposed on the owner of a vessel in navigation to furnish a vessel reasonably safe and fit for its intended purpose. *E.g., Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960); *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85 (1946); *Webb v. Dresser Industries*, 536 F.2d 603 (5th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); *White v. Rimrock Tidelands, Inc.*, 414 F.2d 1336 (5th Cir. 1969). The shipowner's duty to maintain a seaworthy vessel is absolute, and a cause of action for breach of that duty arises even though the unseaworthy condition was unknown to the owner. *E.g., Webb v. Dresser Industries, supra.* The obligation includes the duty to provide a crew fit in numbers, ability and disposition. *See, e.g., Usner v. Luchenback Overseas Corporation*, 400 U.S. 494 (1971); *Boudoin v. Lykes Brothers Steamship Co., Inc.*, 348 U.S. 336 (1955); *Clevenger v. Star Fish & Oyster Co.*, 325

F.2d 397 (1963). The shipowner is absolutely liable for injuries to a seaman caused by an unseaworthy condition on the vessel. *E.g., Mitchell v. Trawler Racer, Inc., supra.* It does not matter that the condition of unseaworthiness may be transitory. *Mitchell v. Trawler Racer, Inc., supra.*

6. The accident which occurred on April 1, 1976, and which forms the basis of plaintiff's claim, was proximately caused by the failure of the defendant to maintain a crew competent in both numbers and skill on board "Lay Barge 27" at all times. This failure on the part of the defendant was a breach of the shipowner's absolute and nondelegable duty to maintain a vessel fit for its intended purpose at all times and rendered "Lay Barge 27" unseaworthy.

7. Plaintiff was forced to leave the service of the vessel "Lay Barge 27" solely because of the disability caused by his injuries from the accident of April 1, 1976. As the result of the personal injuries plaintiff received on April 1, 1976, he suffered physical pain and mental anguish, for which he is entitled to be compensated by defendant in the amount of $5,000.00.

8. A seaman is entitled to recover maintenance and cure whenever he is disabled in the service of the ship. *The Osceola,* 189 U.S. 158 (1903). The obligation to provide maintenance and cure is an incident of the employment contract and extends during the period when the seaman is incapacitated to do a seaman's work and continues until he reaches maximum medical recovery. *Calmar Steamship Corp. v. Taylor,* 303 U.S. 525 (1938); *Vaughan v. Atkinson,* 369 U.S. 527 (1962). Plaintiff is entitled to recover maintenance from April 1, 1976, the date of plaintiff's injury and the date plaintiff left "Lay

Barge 27", through May 3, 1976, the day he was found fit for duty and had reached maximum medical recovery, a period of thirty-two days, at the rate of $15.00 a day. The total maintenance due plaintiff is $480.00. The plaintiff is also entitled to recover the sum of $200.00 that he paid as medical expenses in Belgium and the United States.

9. A seaman disabled in the service of the ship is entitled to recover wages, usually referred to as "lost wages" or "unearned wages" to the end of the voyage, *The Osceola,* 189 U.S. 158 (1903), or for the period of time contemplated by his employment contract or until he has reached the maximum medical cure and can work, whichever occurs first. *Vickers v. Tumey,* 290 F.2d 426 (5th Cir. 1961); *Martinez v. Star Fish & Oyster Co., Inc.,* 386 F. Supp. 560 (S. D. Ala. 1974); *Cassidy v. Steamship American Falcon,* 280 F. Supp. 663 (E.D. La. 1968); *Warren v. U. S.,* 75 F. Supp. 836 (D. Mass. 1948). Plaintiff is entitled to recover: unearned wages from April 2 (the first day after his injury for which he was not paid full wages) until May 3, 1976 (the date he was found fit for duty by Dr. Max), a period of thirty-one days. Unearned wages shall be calculated at a rate of $101.20 per day, *i.e.,* his straight-time wage as a pipeline welder, plus one-thirtieth of his expatriation bonus. The $511.02 paid plaintiff during the period April 2, 1976, to April 7, 1976, shall be deducted from the unearned wages due plaintiff. The total unearned wages due plaintiff, after deduction, is $2,626.18.

10. Plaintiff is entitled to recover all earned wages through the date of his discharge, *i.e.,* the $412.50 withheld from plaintiff's wages to cover return travel expenses.

11. Defendant's failure to promptly pay plaintiff the $412.50 withheld from his earned wages constitutes a withholding of wages without sufficient cause, which is prohibited by 46 U.S.C. § 596. Plaintiff is entitled to recover a penalty from defendant for the wrongful withholding of earned wages pursuant to such statute. The period during which the penalty runs is to be determined by the sound discretion of the district court and depends on the equities of the case. *Carribean Federation Lines v. Dahl,* 315 F.2d 370 (5th Cir.), *cert. denied,* 375 U.S. 831 (1963); *Ventiadis v. C. J. Thidobeaux & Co.,* 295 F. Supp. 135 (S.D. Tex. 1968). *Accord, Prindes v. S. S. African Pilgrim,* 266 F.2d 125 (4th Cir. 1959). *Contra, Escobar v. S. S. Washington Trader,* 503 F.2d 271 (9th Cir. 1974), *vacated and remanded on other grounds,* 423 U.S. 1070 (1976); *Swain v. Isthmian Lines, Inc.,* 360 F.2d 81 (3d Cir. 1966). The aim of 46 U.S.C. § 596 is to protect seamen from the harsh consequences of arbitrary and unscrupulous actions of their employers. *American Foreign Steamship Co. v. Matise,* 423 U.S. 150 (1975); *Collie v. Ferguson,* 281 U.S. 52 (1930). On the facts of this case, the appropriate period for imposition of the statutory penalty is from the date of discharge through the date of plaintiff's reemployment, *i.e.,* from April 1, 1976, to May 5, 1976, a period of thirty-four days. The wage rate to be used for computing the penalty is that for straight-time wage as a pipeline welder, plus one-thirtieth of the expatriation bonus, *i.e.,* $101.20. The penalty due plaintiff from defendant is $202.40 per day for thirty-four days, a total of $6,881.60.

12. Plaintiff is entitled to recover the sum of $600.00 he expended for air fare from Antwerp, Belgium, to

Houston, Texas, after he was discharged. He is also entitled to recover the sum of $1,595.00, to reimburse him for personal effects left on board "Lay Barge 27" when he was discharged.

13. The award of prejudgment interest in an admiralty action is addressed to the sound discretion of the district court. *E.g., Scola v. Boat Frances R., Inc.,* No. 79-1169 (1st Cir. March 25, 1980); *Howell v. Marmpegaso Compania Naviera,* 578 F.2d 87 (5th Cir. 1978); *Harrison v. Flota Mercante Grancolombiana, S.A.,* 577 F.2d 968 (5th Cir. 1978); *Brown v. Aggie & Millie, Inc.,* 485 F.2d 1293 (5th Cir. 1973). *See generally, Annot.,* 34 A.L.R. Fed. 126 (1977). An award of prejudgment interest is the rule and should be denied only under certain peculiar circumstances not present in this case. *E.g., McCormack v. Noble Drilling Corp.,* 608 F.2d 169 (5th Cir. 1979); *Dow Chemical Co. v. M/V Gulf Seas,* 593 F.2d 613 (5th Cir. 1979). Although a federal court sitting in admiralty is not bound by the interest rate set by state law, consideration of it is proper. *Sabine Towing & Transportation Co., Inc. v. Zapata Ugland Drilling, Inc.,* 553 F.2d 489 (5th Cir.), *cert. denied,* 434 U.S. 855 (1977); *Geotechnical Corporation of Delaware v. Pure Oil Co.,* 214 F.2d 476 (5th Cir. 1954). The judgment rate of interest in Texas is nine percentum per annum. TEX. REV. CIV. STAT. ANN. art. 5069-1.05 (Vernon 1971), as amended. Neither plaintiff nor defendant presented any evidence justifying a different rate of interest. Under the circumstances of this case, plaintiff is entitled to prejudgment interest at the rate of nine percentum per annum from April 1, 1976, the date of plaintiff's injury and discharge, to the date of judgment on $5,913.68, the total

recovery for maintenance, cure, repatriation expense, the cost of lost personal effects and earned and unearned wages. The prejudgment interest due plaintiff totals $2,506.89.

14. Because defendant's failure to pay maintenance, cure, repatriation expenses, the cost of lost personal effects, and earned and unearned wages was the result of recalcitrant conduct and arbitrary, unreasonable, callous, willful, and wanton disregard of plaintiff's rights, and because of defendant's failure to investigate plaintiff's claim with due diligence, plaintiff is entitled to attorney's fees. *Vaughan v. Atkinson,* 369 U.S. 527 (1962); *Lirette v. K & B Boat Rentals, Inc.,* 579 F.2d 968 (5th Cir. 1978). An attorney's fee of forty per centum of these items of recovery, including plus prejudgment interest (which is the rate provided by plaintiff's agreement with counsel), is reasonable under the circumstances. The amount of the attorney's fees due plaintiff is $3,368.23.

15. Because plaintiff did not intentionally misrepresent or conceal any material medical facts the disclosure of which was plainly desired, he is not barred from recovery by his failure to disclose his prior history of hemorrhoids. *McCorpen v. Central Gulf Steamship Corp.,* 396 F.2d 547 (5th Cir.), *cert. denied,* 393 U.S. 894 (1968).

16. Costs shall be taxed against defendant.

SIGNED and ENTERED this 6th day of May, 1980.

/s/ WM. WAYNE JUSTICE
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

NO. S-78-26-CA

DANNY L. GRIFFIN

v.

OCEANIC CONTRACTORS, INC.

JUDGMENT

Based upon the fiindings of fact and conclusions of law this day entered in the above-entitled and numbered civil action, it is

ORDERED, ADJUDGED, and DECREED that plaintiff, Danny L. Griffin, shall be, and he is hereby, awarded judgment against the defendant, Oceanic Contractors, Inc., in the following amounts:

(1) $5,913.68, as recovery for maintenance and cure, earned and unearned wages, repatriation expense and the value of lost personal effects;

(2) $2,506.89, as prejudgment interest on the recovery for maintenance and cure, earned and unearned wages, repatriation expense, and the value of lost personal effects;

(3) $3,368.23, as attorney's fees for the recovery for maintenance and cure, earned and unearned wages, repatriation expense and prejudgment interest; and

(4) $11,881.60, as recovery for pain and suffering and penalty wages.

It is further

ORDERED, ADJUDGED, and DECREED that the total amount of this judgment, including attorney's fees, *i.e.*, $23,670.40, shall bear interest at the rate of nine percentum (9%) per annum from this date until paid, and that defendant pay all costs of court.

SIGNED and ENTERED this 6th day of May, 1980.

/s/ WM. WAYNE JUSTICE
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

C. A. NO. A-78-26-CA

DANNY L. GRIFFIN,
Plaintiff,

vs.

OCEANIC CONTRACTORS, INC.,
Defendant.

SATISFACTION OF JUDGMENT

Payment in full by defendant, Oceanic Contractors, Inc., of all amounts due therefrom under the final judgment entered herein on the 7th day of May, 1980, is hereby acknowledged, and satisfaction full and complete and acquittance in full, including interest, is hereby given, except as to costs of court and such additional sums, if any, that may be awarded to the plaintiff by the United States Court of Appeals for the Fifth Circuit or the Supreme Court of the United States.

DATED at Houston, Texas, this 17th day of September, 1980.

/s/ Danny L. Griffin
DANNY L. GRIFFIN
Plaintiff

FRIEDMAN & CHAFFIN

By /s/ Robert A. Chaffin
Attorneys for Plaintiff,
Danny L. Griffin

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 80-1599

Summary Calendar

D. C. Docket No. CA-S-78-26

DANNY L. GRIFFIN,
Plaintiff-Appellant,

versus

OCEANIC CONTRACTORS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

Before BROWN, POLITZ and TATE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

June 17, 1981

Issued As Mandate: Jul. 9, 1981

JUDGMENT AND OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-1599

Summary Calendar

DANNY L. GRIFFIN,
Plaintiff-Appellant,

versus

OCEANIC CONTRACTORS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

(JUNE 17, 1981)

Before BROWN, POLITZ and TATE, Circuit Judges.
TATE, Circuit Judge.

The plaintiff, Danny Griffin, was injured on a vessel while in the employ of the defendant, Oceanic Contractors, Inc. He brought suit against his employer seeking damages under the Jones Act, 46 U.S.C. § 688, the general maritime law of the United States, and for penalty wages under 46 U.S.C. § 596.[1]

1. 46 U.S.C. § 596 provides:
The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or

After a judge trial on the merits, the trial court found that Griffin's injury was caused by an unseaworthy condition of the vessel, and accordingly awarded him an amount totalling $23,670.40. On appeal, Griffin contends that this award was insufficient due to the trial court's error (1) for failure to award him lost wages for his entire contractual term, (2) for failure to include any bonus and/or overtime pay in the computation of earned and/or unearned wages, and (3) for failure to properly apply the penalty wage statute, 46 U.S.C. § 596.

Facts

Plaintiff Griffin signed an employment contract on February 18, 1976, with the defendant, Oceanic Contractors, Inc. [hereinafter "Oceanic"], agreeing to work as a senior pipeline welder on defendant's vessels operating in the North Sea. The contract stipulated that his employment would commence "on the date of [his] departure and will continue . . . until December 15, 1976

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at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts.

or until Oceanic's 1976 pipeline committal in North Sea is fulfilled whichever shall occur first."

Griffin shortly thereafter flew to Antwerp, Belgium, and reported to the vessel, Lay Barge 27, which was tied up in the harbor for winter repairs. On April 1, 1976, in getting the barge ready to put to sea, Griffin developed traumatic thrombosed hemorrhoids when he attempted to move an empty oxygen bottle by himself.

On April 3, 1976, emergency surgery was performed on Griffin at a hospital in Antwerp, where he remained until April 5, 1976. On April 6, 1976, he flew back to his home in Houston, Texas, and was there examined by Dr. Ernest Max, a colon and rectal surgeon, on April 6, 14 and 28, 1976. Griffin reached maximum medical recovery *and* was found fit to return to duty on May 3, 1976.

Griffin brought suit against Oceanic under the Jones Act, general maritime law, and 46 U.S.C. § 596, for its failure to pay maintenance and cure, repatriation expenses, and earned and unearned wages. The trial court found that the vessel was unseaworthy due to an insufficient number of the crew members, and that Griffin's injury resulted from this unseaworthy condition (because he had no aid in moving the oxygen bottle.)

The trial court awarded the damages totalling $23,670.40 to Griffin, as follows: (1) $5,913.68, as recovery for maintenance and cure, earned and unearned wages, repatriation expense and the value of lost personal effects; (2) $2,506.89, as prejudgment interest on the recovery for maintenance and cure, earned and unearned wages, repatriation expense, and the value of lost personal ef-

fects; (3) $3,368.23, as attorney's fees for the recovery for maintenance and cure, earned and unearned wages, repatriation expense and prejudgment interest; (4) $5,-000.00, as recovery for pain and suffering and penalty wages; and (5) $6,881.60 as penalty wages.

Griffin's appeal questions only the refusal of the trial court to allow him full wages (straight time, overtime, and bonuses) for the entire period of his contractual employment (the trial court limited the wage-recovery to the period of disability), and its failure to award him the full statutory penalty, 46 U.S.C. § 596 (quoted at note 1), of double-daily wages for each day until the time of actual payment in 1980 of the unpaid wages earned in 1976 (the trial court awarded him double the daily rate of straight time wages for the 34-day period of unemployment during 1976, or a total of $6,881.60).

I

The trial court allowed Griffin to recover unearned wages from the day after his injury, April 2, to the date he was found fit for duty by Dr. Max, May 3, 1976. On appeal, Griffin urges that the trial court committed an error of law in not awarding him unearned wages until the ending date of his contractual period of employment, which in this instance was September 15, 1976, the date on which Oceanic's pipelaying season was completed in the North Sea.

Griffin advances three separate theories upon which he should recover unearned wages from April 1 to September 15: (1) under the general maritime law (as part of his claim for maintenance, wages, and cure); (2) as

general damages under the Jones Act; and (3) under a breach of contract theory.

We find all three to be inapplicable to the facts before us.

The right of an injured seaman to recover unearned maintenance-wages-cure (M-W-C) wages under the general maritime law of the United States until either (1) the end of the voyage or (2) the end of the contractual period of employment is well established. *See, e.g.,* The Osceola, 189 U.S. 158, 175, 23 S.Ct. 483, 487 (1903); Isthmian Lines v. Hare, 334 F.2d 521 (5th Cir. 1964); Vickers v. Tumey, 290 F.2d 426, 434 (5th Cir. 1961); Rofer v. Head & Head, Inc., 226 F.2d 927, 929 (5th Cir. 1955); 2 M. Norris, The Law of Seamen 17 § 544, p. 17 (3d ed. 1970). However, if the seaman recovers from the injury and is fit to return to duty prior to the termination of the voyage or his contractual period, then he is not entitled to continue to receive M-W-C wages past that point.[2] *See* Vickers v. Tumey, *supra,* 290 F.2d at 434-435; Martinez v. Star Fish and Oyster Co., 386 F.Supp. 560, 564 (S.D. Ala. 1974); Warren v. United States, 75 F.Supp. 836, 838 (D.C. Mass. 1948).

As Griffin contends, lost wages may also form an element of damages in a suit brought under the Jones Act. *See* Vickers v. Tumey, *supra,* 290 F.2d at 434.

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2. In Warren v. United States, 75 F. Supp. 836, 838 (D.C. Mass. 1948), the court found that a seaman was entitled to M-W-C wages "until the time the seaman is not only well but able to find suitable employment." For purposes of the present case, we pretermit discussion of whether a seaman has to be both fit for duty and able to find suitable employment in order for M-W-C wages to be terminated, for here the trial court found as a fact that Griffin had accepted new employment on May 5, 1976, just two days after he was pronounced fit for duty.

Nevertheless, even under the Jones Act (under which a plaintiff may recover for loss of future earnings after the termination of voyage or contract), Griffin is not allowed to recover for lost wages past May 3, 1976, because he was found to have fully recovered as of that date and was found to have incurred no diminution of future earnings as a result of his injury. Any decrease in earnings after May 3 was due to Griffin's failure to return to work for Oceanic, not from his injury, since Oceanic (see below) held his position open for him.

Finally, Griffin contends he is due unearned wages through September 15, 1976, because the defendant breached his employment contract by wrongfully discharging the defendant on April 1, 1976. The trial court did indeed find that Griffin was discharged effective April 1, but it failed to state that such a discharge constituted a breach of contract. Although notice was sent to Griffin that his discharge was effective April 1, such notification was not transmitted until June 2 (after unsuccessful efforts to contact Griffin and discover when he would return to work) (Def. Ex. 11, 12, Tr. 364-67), and the evidence in the record establishes that Griffin's job was held open until at least June 1, 1976 (Def. Ex. 12), that he made no effort to return to work for Oceanic (indeed, he obtained new employment on May 5), and that Oceanic made numerous attempts to contact Griffin for the purpose of re-employment.[3]

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3. The district court did not make an express finding as to the nonbreach of contract, but under the virtually uncontradicted evidence, any finding of breach would have been clearly erroneous, so the issue may be reviewed by us without remand. See Kratzer v. Capital Marine Supply, Inc., _____F.2d_____, _____ (5th Cir. 1981) (sl. op. p. 7218, 7225, May 20, 1981).

II

The plaintiff also contends that the trial court erred in not awarding him (1) bonus pay for the period prior to his injury and (2) bonus and overtime pay for the period between April 2 and May 3.

We disagree. Griffin's contract provided for (1) an annual bonus and (2) a contract-completion bonus. The trial court found that "the terms of the contract provide that such bonuses are not payable unless the employment term is completed by the employee." Since the employment term was not completed, we do not find that the trial court was clearly erroneous in not including a proportionate amount of these bonuses in computing Griffin's unearned wages, either on a contract theory or as Jones Act wage damages.

Furthermore, the district court did not include any overtime pay for the period between April 2 and May 3. Again, we cannot say that the district court erred. The actual amount of overtime was uncertain, and hence any inclusion of such would have been purely speculative. *See* Martinez v. Star Fish and Oyster Co., 386 F. Supp. at 564; Keefe v. American Pacific Steamship Co., 110 F. Supp. 853, 856 (S.D. Cal. 1953).

III

The district court found that Oceanic's failure to promptly pay $412.50 withheld from wages already earned by Griffin constituted a withholding of wages without sufficient cause. Under 46 U.S.C. § 596, Griffin was entitled to recover a penalty for this wrongful withholding. The statutory penalty requires payment of a penalty of

(twice the daily wage rate for each) to the seaman until he is actually paid (see note 1 for statutory text), which in his case was not until September, 1980, after the judgment below. The trial court computed this penaltty, however, by doubling Griffin's daily straight-time wage only for the period from April 1, 1976 to May 5, 1976, the date of his re-employment.

Griffin contends that the trial court erred in so applying the wage penalty only from April 1 through May 5, 1976, arguing that it should have been awarded for each day during which the failure to pay continued, a period not ending until September, 1980.

In this circuit, the duration on applying the wage penalty statute (46 U.S.C. § 596) is left to the sound discretion of the district court. Caribbean Federation Lines v. Dahl, 315 F.2d 370, 374 (5th Cir.), cert. den., 375 U.S. 831 (1963). Ventiadis v. C. J. Thibodeaux & Co., 295 F.Supp. 135, 138 (D.C. Tex. 1968).[4] Absent any abuse, we do not disturb the trial court's order.

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4. The plaintiff Griffin accurately states that other circuits view § 596 as establishing a mandatory time period for its application. However, the Supreme Court in American Foreign S.S. Co. v. Matise, 423 U.S. 150, 152 n.1, 96 S.Ct. 410, 312 n.1 (1975) recently noted this circumstance and also that the Fifth Circuit view as to the discretionary time period application is shared by a majority of circuits that have considered the issue:

> While the Third and Ninth Circuits have found that the trial judge has no discretion in determining the amount of the penalty under § 596, Swain v. Isthmian Lines, Inc., 360 F.2d 81 (CA 3 1966); Escobar v. S.S. Washington Trader, 503 F.2d 271 (CA 9 1974); cert. pending sub nom. American Trading Transp. Co. v. Escobar, No. 74-1184, the First, Second, Fourth, and Fifth Circuits have concluded that the length of time to which the penalty applies—and hence its amount—is subject to the discretion of the District Court. Mavromatis v. United Greek Shipowners Corp., 179 F.2d 310 (CA 1 1950); Forster v. Oro Navigation Co., 228 F.2d 319 (CA 2 1955), aff'g 128 F. Supp. 113 (S.D.

Here, after considering the equities involved, the trial court granted Griffin penalty wages only for the period during which he was actually not employed. We are unable to state that the district court abused its discretion by so doing.

Conclusion

In summation, we find that the trial court neither abused its discretion nor committed any error of law in the computation of the damage award granted to plaintiff Griffin. We, therefore, AFFIRM the decision of the trial court.

AFFIRMED.

N.Y. 1954); Southern Cross S.S. Co. v. Firipis, 285 F.2d 651 (CA 4 1960), cert. denied, 365 U.S. 869, 81 S.Ct. 903, 5 L.Ed. 2d 859 (1961); Caribbean Federation Lines v. Dahl, 315 F.2d 370 (CA 5 1963).

Under the precedential rule of this circuit, until it is overruled by en banc opinion, this panel is bound by prior circuit precedent.

PLAINTIFF'S EXHIBIT 1(a)-(f)—
EMPLOYMENT AGREEMENT
BETWEEN OCEANIC CONTRACTORS
AND DANNY L. GRIFFIN,
Dated February 18, 1976.

OCEANIC CONTRACTORS, INC.

Employment Agreement

North Sea Division

DATE: February 18, 1976 Soc. Sec. No. 454-78-1097

MR. Danny Laried Griffin Employee No. _____

Oceanic Contractors, Inc. North Sea Division agrees to employ you for services at North Sea as a Welder. Your employment will begin on the date of your departure and will continue for a period of until December 15, 1976 or until Oceanic's 1976 pipeline committal in North Sea is fulfilled whichever shall occur first unless your services are sooner terminated, at a base rate of pay of:

Pipeline Welder	$ 9.65 per hour
Expatriation Premium	$720.00 per month
Structural Welder*	$ 6.65 per hour
Expatriation Premium*	$495.00 per month

In the event of accident or emergency, the Employer is authorized to notify:

Dick Griffin Name	Father Relationship if any
Route 1, Box 44 Center, Texas 75935 Address	(713) 598-3592 Telephone

The Employer assumes no duties or obligations to the Employee, express or implied, except those that may arise specifically out of applicable statute or law.

You agree by your signature, to continue in our employ for the period above set out under the terms and conditions outlined herein.

Employee reserves the right to terminate this Agreement at will without notice for any reason other than completion or cessation of the job, work or project to which the employee is assigned. In such cases of completion of job, work, or project, Employer will give thirty (30) days written notice of termination where practicable. All compensation and benefits provided by the Employer shall cease at the time of termination of this employment agreement, except as may be otherwise provided or agreed upon.

I UNDERSTAND AND AGREE TO THE ITEMS ON THE ATTACHED PAGES

By: /s/ DAN GRIFFIN By: Signature Illegible
SIGNATURE OF EMPLOYEE

2-18-76
DATE

Date of Departure March 7, 1976 Date of Return_____

ATTACHMENTS:
Pages 2, 3, NS4, H5, NS6

*Structural rate includes, but is not limited to, all winter rig up and maintenance work.

PROCESSING

You agree to have completed the following items prior to your departure from the United States:

1. Procurement of a valid passport from the United States of America.
2. A Visa, Travel, or Work Permit.
3. A physical examination to certify your fitness to perform the duties to which you will be assigned.
4. The Employee will be administered to inoculations as required per geographical area. The Employee Relations Department will maintain an updated listing of required inoculations.

   These should be recorded on an "International Certificate of Vaccination" form. An acceptable certificate may be provided attesting to effective immunization in lieu of taking the inoculations.

You will be assisted in securing the necessary passport, visas, inoculations and other necessary documents, and you shall be paid one day's pay of eight (8) hours for each actual day of processing as determined by the Employer. This processing pay will be at your base rate.

HOW YOU WILL BE PAID

You will be paid on a semi-monthly basis by deposit of check in United States of America currency in a United States Bank, which is to be designated by you. If desired, arrangements can be made for payment of salary in two (2) checks, one of which may be deposited in your designated United States bank and the other received by

you. You will make arrangements prior to departure from the United States or with the Employer's office manager in the work area.

FAMILY STATUS

You enter into this Agreement with the understanding that your employment outside the continental limits of the United States will be on a single status only. It is intended that your family remain in the United States. You agree this Agreement is between the Employer and you, and that your family is not a party to this Agreement, and that the movement, safety and well-being of your family is your total responsibility and is not shared by the Employer in any respect.

GROUP HOSPITALIZATION, MEDICAL AND LIFE INSURANCE PLAN

Provided you now are a participant or will meet the requirements of the Plan as administered by J. Ray McDermott & Co., Inc., you may continue or will participate in the Plan in accordance with the provisions of the Plan. Deductions for your portion of the premium will be made once each month and shall be in accordance with the amount as specified in the Plan.

WORKMEN'S COMPENSATION

The Employer shall provide, through insurance and other arrangements, for payment of industrial accident compensation and benefits to you, in accordance with the laws of the country where you are working, the compensation and benefits being at least equal to the Workmen's Compensation Law of the State of Louisiana.

PHYSICAL EXAMINATION

You agree to submit to a physical examination prior to leaving your place of overseas employment or upon termination of your employment, by a physician selected by the Employer.

PERMANENT ADDRESS

The address of the person to be notified in the event of an accident or emergency as shown on the first page of this Employment Agreement shall be considered as your permanent address or the address of the person in whose care the Employer may communicate with you. In the event of your death while outside the continental limits of the United States during the period of this service under this Agreement, the Employer shall attempt to communicate with the person at the given address, and in the event no directions are received from such person within a reasonable time, or in the event you have left no written instructions with the Employer concerning the disposition of your body or personal effects, you authorize the Employer to make disposition of your body according to the law where you are employed at the time of your death and to return your personal effects to the Executor or Administrator of your estate, or to the person named at the permanent address as appears to best expeditiously handle such matters.

DEDUCTIONS—INCOME, F. I. C. A. AND OTHER TAXES

There will be withheld from your pay the amount which in the opinion of counsel for the Employer is required or may be required for the payment of income taxes under the laws of any country in which you may work.

Such amount will be paid over to such Governments to the extent required for the payment of such taxes. The balance, if any, will be paid to you when in the opinion of counsel for Employer no further payments on account of such taxes are, or may be, required.

The Company has elected not to participate in the Federal Income Contribution Act for personnel on foreign assignment. Accordingly, the Company will not make F. I. C. A. deductions from or F. I. C. A. payments, on your earnings while you are on foreign assignment.

Under no circumstances will the Company be liable for any taxes for which you may become liable while you are on foreign assignment.

TRANSPORTATION

The Employer will furnish tourist class air transportation for you from your home location to your work site. Subject to the conditions set forth herein, return transportation of the same class will be furnished if you proceed directly to the United States upon leaving our employment.

You will be permitted to take with you up to forty-four (44) pounds of luggage which includes the weight of the container. In addition, you will be reimbursed for actual expenses not to exceed one hundred twenty eight dollars ($128.00) for baggage in excess for forty-four (44) pounds. You will be responsible for paying the excess baggage amount initially, and in order to receive the reimbursement, you must present the receipt for such payment to the barge clerk at the North Sea location.

If your services are terminated for cause or if you should quit your job prior to the date of termination of this

Employment Agreement, you will be charged with your return transportation. The Employer will have the option of withholding One Hundred Thirty Seven and 50/100 dollars ($137.50) from each of your first four (4) full pay periods as a cash deposit for the payment of your return transportation in the event you should become obligated for its payment. If the cost of return transportation is less than Five Hundred Fifty and 00/100 ($550.00) dollars the balance will be given to you with your final pay. If the cost of the return transportation is greater than Five Hundred Fifty and 00/100 ($550.00) dollars, the excess will be deducted from your final wage payment and/or any other monies due you. The Five Hundred Fifty and 00/100 ($550.00) dollars will be included in your final check, if you are not responsible for your return transportation.

DISCLOSURE OF INFORMATION

Employee hereby agrees that he will not, except with the prior written consent of Employer, make directly or indirectly any statements publicly whether to the press or in books, magazines, and periodicals or by advertisement or by radio, television or film or by any other medium with respect to matters relative to the operations of the Company with whom the Employer is working, or with respect to matters of a political nature which might impair the relations of the Employer, Employer's customers or subcontractors, or any other companies with whom the Employee is working or with any governments in the local area.

IMMEDIATE INCOME

You will receive your base rate of pay for eight (8)

hours per day, seven (7) days per week when you are available for work. Any time worked in excess of eight (8) hours in one day shall be paid at one and one-half (1½) times the hourly base rate. You agree to work such hours as may be assigned by the Employer. You will be paid from the date of your departure from the United States through the date fixed by the Employer for your departure from your work site, provided however, your pay will terminate immediately in the event of your voluntary quit or discharge for cause. No pay will be made for any day of absence from work unless excused by the Employer. If at any time during the course of your employment you are absent from work on any given day through your willful neglect, the Employer, at its option, may elect not to pay you the normal day's pay for this unauthorized absence. This type of unauthorized absence may be considered as cause for termination of your contract by Employer.

EXPATRIATION PREMIUM

You will receive an Expatriation Premium as shown on page one (1) of this Contract when you are available for work.

ANNUAL BONUS

You will receive an Annual Bonus of ten (10%) per cent on the total straight time portion of your pay, which is total hours worked times base rate of pay. This bonus is payable on earnings through November 30 and will be paid some time between December 1 and December 15, or upon completion of the Employment Agreement, whichever comes first.

CONTRACT-COMPLETION BONUS

A Contract-Completion Bonus of sixteen and two-thirds (16⅔%) per cent on the total straight time portion of your pay will be paid on completion of this Agreement.

VACATION

You will be entitled to a credit of two and one-half (2½) calendar days of vacation for each full calendar month of service rendered. Your vacation time will be paid on the basis of eight (8) hours per day at the base hourly rate and you agree to take your vacation upon satisfactory completion of your work. You will assume the responsibility regarding the use of vacation time to maintain your tax status under United States Federal Income Tax Laws.

TERMINATION BY DISCHARGE, ABANDONMENT OF WORK, OR RESIGNATION

If your services are terminated by reason of discharge for cause, abandonment of your work, or resignation, no vacation allowance, annual bonus, or contract-completion bonus is earned and none will be paid. If your employment is terminated pursuant to the thirty (30) day notice provision hereof these bonuses will be paid to date of termination on the basis of earnings and time of employment to such date.

TIME OFF

You will be allowed five (5) days off each month of employment under this Agreement. Depending upon the work schedule and the necessity of maintaining continuity of operations at the job site, the Employer may elect for

you to continue working without time off for a reasonable period of time. Should the Employer elect that you work, you will be paid an additional eight (8) hours per day at your straight time rate with all applicable bonuses for each day off not allowed; provided, if the Employer requires you to work your scheduled time off, it shall be your responsibility to see that your supervisor prepares and signs the time ticket for the additional hours given for working time off. This signed time ticket must then be submitted by your supervisor to the respective regional administrative office or you will not be entitled to pay for working your time off. The aforementioned five (5) days include travel time to and from the work site. You will not be paid for any air transportation unless you actually take time off and these expenses are incurred.

You cannot accumulate time off; therefore, you must take your time off when scheduled by the Employer.

During such days of time off the job taken, the employer will provide you with a hotel room or other accommodations, six dollars ($6.00) per day for meals and transportation to said accommodations, or at the employer's option, pay you twenty dollars ($20.00) per day for a maximum of five days, to cover all of these expenses while you are on time off. The above payments and benefits are payable only if and when you take time off. When you leave the work area during any time off period, the Employer shall have no responsibility for you and shall have no liability for an injury or illness suffered by you from the time of your departure from the work area until you return.

While on time off, you will be paid for eight (8) hours per day at your straight time rate.

PLAINTIFF'S EXHIBIT 29—LETTER FROM MR. GRIFFIN TO MR. GOLLER DATED NOVEMBER 17, 1978

17 November 1978

Mr. Ted Goller
Fulbright & Jaworski
Bank of the Southwest Bldg.
Houston, TX 77002

Re: Dan Griffin vs. J. Ray McDermott, et al

Dear Ted:

Although we have yet to compile all of the information and documents needed to give this case a 100% accurate analysis I do believe that the evaluation made below will prove to be accurate. The reason I am writing you with this evaluation and demand is because of the many different elements of damages, statutory and common law, involved with this case. Although it is a rather bizarre situation the case has a great deal of potential for my client with a corresponding amount of exposure for your clients. Virtually every element of damage found in maritime personal injury cases is potentially present in this case. In particular, the potential for a large award of penalty wages cannot be ignored.

Facts:

Dan Griffin suffered an injury on approximately March 31, 1976, which required hemorrhoid surgery on approximately April 2, 1976. The condition of Mr. Griffin although aggravated by heavy lifting and straining all dur-

ing March of 1976 was finally climaxed by the oxygen bottle incident which Mr. Griffin described in his deposition. Acording to Mr. Griffin the "LB 27" was not properly staffed in that welders' helpers were not furnished as is customary in the industry. This condition would result in an unseaworthy vessel and place liability for Mr. Griffin's injuries with your clients. Following his surgery Mr. Griffin was released from the hospital and returned to Houston on April 5, 1976 after contacting his supervisor on the "LB 27" and being assured that he could leave his belongings on the "LB 27" and return to his old job as soon as he was physically able. Mr. Griffin was not paid his earned wages at the time of his departure to return home. In addition, Mr. Griffin paid all of his own repatriation expenses, part of his own medical expenses in Belgium and all of his United States medical expenses. Subsequent to all of this Mr. Griffin received a telephone call from overseas during the latter part of April, 1976 informing him that his job was no longer available, i.e. this being the last possible date of his discharge from the "LB 27". At this point Mr. Griffin sought to have his personal belongings returned to him from the "LB 27", to get reimbursement for travel and medical expenses and to collect the bonus payments due him, these bonus payments would constitute earned wages, for the work he did while on the "LB 27". Your clients were well aware that Mr. Griffin had become disabled while in the service of the vessel "LB 27" and that he undoubtedly had certain conditions coming to him. Mr. Griffin's right to maintenance and cure and payment for earned wages was totally ignored. In summary, Mr. Griffin has never received any sort of monetary payment from your clients, despite repeated demands which are evidenced in your

files, with the exception of wages due from March 15, 1976 through March 31, 1976, which were forwarded to him by mail in Houston after his return from Belgium. These wages should have been paid to Mr. Griffin before his departure for Houston. All indications are that your clients considered Mr. Griffin discharged from the "LB 27" as of March 31, 1976 since this is the last day he appeared on the payroll. Mr. Griffin subsequently remained under the care of Dr. Max in Houston until approximately May 6, 1976, at which time he would have returned to the "LB 27" if his job had been reserved. As of this date Mr. Griffin has been advised by Dr. Max that additional corrective surgery is needed to completely alleviate the problems brought about by his accident. This additional corrective surgery will incapacitate Mr. Griffin for another six to eight weeks at some time in the near future.

Elements of Compensation Due Dan Griffin:

1. Maintenance and cure from April 1, 1976 through May 6, 1976, a total of 36 days at $8.00 per day plus 2½ years interest at 7% which is the average federal rate over the past several years. Uncontested amount currently due of approximately $340.00. Attorney's fees in an undetermined amount are potentially due here since Mr. Griffin was unable to collect without legal assistance.
2. Reimbursement of travel and medical expenses paid by Mr. Griffin plus 2½ years interest at 7%. Uncontested amount currently due of approximately $600 to $800.
3. Payment of unearned wages, no liability claim would be required for unearned wage payments

due until the voyage ended, from April 1, 1976 through the date the "LB 27" completed the 1976 pipe laying season, somewhere around October 1, 1976, plus 2 years interest at 7%. Unearned wages would include the following elements: Regular time pay, overtime pay, room and board value, pipe bonus, annual bonus of 10%, completion bonus of 16.67%, vacation pay of 40 hours straight pay for each 25 barge days, and market value of fringe benefits. Your clients would be entitled to an offset for wages earned by Mr. Griffin on other offshore jobs during the 1976 season. Total unearned wages due Mr. Griffin would be in the range of $40,000 to $60,000 before offsets by my best estimate.

4. Penalty wages are potentially due for the failure to timely pay earned wages. These penalties are still accruing in my opinion at the rate of approximately $300 per day, representing two days pay for Mr. Griffin while working on the "LB 27", since at the time of his discharge Mr. Griffin had earned wages due him in the form of bonus payments which he has continually tried to collect without success. I can see no reason why a seaman such as Mr. Griffin would not be entitled to penalty wages where there is no dispute as to the fact that he had earned wages in the form of bonuses at the date of his discharge. Demand for these wages as well as payment for sick time was made verbally and in writing by Mr. Griffin with absolutely no meaningful response by your clients. Total penalties could conceivably be in the range of $200,000 as of this date with continued accrual until the date all earned wages are paid.

5. Reimbursement for loss of personal belongings with 2½ years interest at 7%. Value of belongings with interest of approximately $1,800.

6. Pain and suffering for past as well as the future for additional corrective surgery. Two hemorrhoid surgeries as well as the discomfort of the original injury itself would seem to have a value somewhere in the range of $10,000 to $15,000.

7. Loss of earnings in the past and future. Past losses would be equivalent to the unearned wages claim with future losses of $3,000 to $6,000 depending upon the averaging period used to compute average monthly wages. Past lost wages would not be awarded if unearned wages were paid. However, this could represent a separate means of collecting unearned wages if problems with seaman status should arise. Mr. Griffin undoubtedly would have been able to complete the 1976 pipe laying season aboard the "LB 27" since he was undisputably a good welder who worked hard at his job.

8. Future medical expenses along with maintenance and cure during the recuperation period for the future surgery. This would amount to something in the range of $2,000 to $3,500 with hospital charges included.

I would suggest that you review my analysis of the case and advise me of your feelings on the matter. Also, I have enclosed the following documents: (1) narrative reports and records of Dr. Max; (2) medical bills, overseas and domestic, paid by Mr. Griffin; (3) earnings records for 1974-76; (4) copy of March 15, 1976 through March

31, 1976 pay voucher; (5) correspondence between Mr. Griffin and your clients; (6) 1974 employment contract; (7) copies of all other expenses incurred by Mr. Griffin as a result of the hemorrhoid condition. It would seem appropriate to try and dispose of this case as quickly as possible in order to halt further accumulation of penalty wage payments.

Thank you for your consideration.

Sincerely,

FRIEDMAN AND CHAFFIN
Robert A. Chaffin
RAC/ss
Enclosures

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MR. CHAFFIN: Before we start, Your Honor, I have two sets of the exhibits here. These are the original documents which I pass to the court and copies which I pass to the clerk (indicating).

THE COURT: For the record, all exhibits in the final Pre-trial Order both for the plaintiffs and the defendants to which no objection has been made in the Final Pre-Trial Order are now received in evidence. If there is an objection to an exhibit that is tendered or that is listed in the Final Pre-Trial Order, I will expect counsel will offer the exhibit in a conventional fashion, and the objection that is expressed in the Final Pre-Trial Order must be renewed before I will consider it. All right.

MR. Goller: Your Honor, if I may, there are two exhibits in the list just tendered to which I do have objections which I have objected to in the Pre-Trial Order. Those are Numbers 29 and 30 on Mr. Chaffin's list.

THE COURT: You have now objected for the court, and since this is a bench trial, I'll overrule your objection, but it's not my intention to consider anything that I regard as inadmissible.

MR. CHAFFIN: Your Honor, let me say in regard to those two exhibits. It's the plaintiff's intention to offer them only for the purpose of showing notice that the penalty provisions of Title 46, U.S.C. 596 was being invoked, and the penalty was continuing to run during the pendency of the lawsuit. That is the purpose of offering them. I don't offer them for any other purpose than that, and Mr. Goller has really put that on record in

the Pre-Trial Order, and that's the only purpose that I have, and I agree with the objection except for that point.

MR. GOLLER: As I stated in my objection, if that's the sole purpose of offering them, I have stipulated in the Pre-Trial Order when the letters were received by me and that they did contain the notice of his contentions.

THE COURT: Thank you.

TELEX MESSAGE
Dated April 5, 1976.

1322 Greenwich Time—April 5, 1976
To: HAYDEN/LAYRISSON/NEW ORLEANS
From: EVANS/APPLE/BRUSSELS
Information: J. WILLIAMS/BRUSSELS

Re: Danny Griffin

Subject employee underwent operation in this area on 2 April and is returning to U.S. today 5 April for convalescence which should be for approximately 2-3 weeks. He purchased a round trip ticket before departure and should contact you for clearance before returning. Please have him cleared by doctor before returning him and send to LAY BARGE 27. Please advise arrival.

Defendant's Exhibit
No. 15

TELEX MESSAGE
Dated May 5, 1976.

1753 Greenwich Time—May 5, 1976
To: MIKE APPLE/BRUSSELS
From: CHARLES LAYRISSON/NEW ORLEANS

Daniel Griffin called our offices and advised that the doctor has still not released him. He should be released within a week to ten days. He will travel to New Orleans for a physical by our doctors and we will advise his arrival date once known.

Defendant's Exhibit
No. 14

TELEX MESSAGE
Dated May 21, 1976.

TELEGRAM

1244 Eastern Standard Time
New Orleans, Louisiana—May 21, 1976
Danny Laried Griffin
Route 1, Box 44
Center, Texas 75935

Please contact me immediately at 504-587-5152.

Oceanic Contractors, Inc.
Charles F. Layrisson
Personnel Administrator

Defendant's Exhibit
No. 13

62

TELEX MESSAGE
Dated June 1, 1976.

1518 Greenwich Time—June 1, 1976
To: C. LAYRISSON/NEW ORLEANS
From: J. EVANS/M. APPLE/NSD BRUSSELS
Information: J. WILLIAMS/NSD BRUSSELS
M. CALLOW/NSD BRUSSELS
A. McTIERNAN/NSD BRUSSELS

Re: Danny Griffin

This is to advise that effective today subject employee has been terminated.

Should he contact you please advise him.

Defendant's Exhibit
No. 12

HANDWRITTEN NOTE OF CHARLES F. LAYRISSON, Defendant's Personnel Administrator.

6/2/76

File in personnel jacket.

Advised Danny Griffin's father, contract terminated 6/1/76. Father states he is working for someone else. /C/

Defendant's Exhibit
No. 11

TELEX
Dated September 30, 1976.

0930 Greenwich Time—September 30, 1976
To: BARGE CLERK LAY BARGE 27 VIA ANTOC
From: MARTIN K. WHITEHILL/JVDS/NED
BRUSSELS

Re: Griffin, Laried Danny/Payroll Deductible

Griffin spent three days in "Vesalius Hospital" at Brasschaai from April 2 to April 5, 1976. Please advise as soon as possible if this is in connection with a work accident. If it was please forward accident report.

Employee number 48549.

End.

Defendant's Exhibit
No. 9

TELEX
Dated October 1, 1976.

1630 Greenwich Time—October 1, 1976
To: MARTIN WHITEHILL/BRUSSELS
From: J. A. LOFTIN - T. EVANS/LAY BARGE 27
(ANTWERP)

Subject: Griffin, Laried Danny/Payroll Deductible

Reference: Your Telex BX-09-0955

Have no record of work accident on subject man for the period listed in your telex. Might contact Jessie Williams —Brussels for further information.

Regards, Tom.

Defendant's Exhibit
No. 10

Opposition

Office-Supreme Court, U.S.
FILED
OCT 17 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DANNY L. GRIFFIN,
Petitioner

v.

OCEANIC CONTRACTORS, INC.,
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT

THEODORE GOLLER
800 Bank of the Southwest Building
Houston, Texas 77002
(713) 651-5151
Attorney for Respondent

Of Counsel:

R. SCOTT HOGARTY and
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800 Bank of the Southwest Building
Houston, Texas 77002

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

QUESTION PRESENTED

Whether or not, under the facts and circumstances of the case, a district court is empowered to exercise its discretion in determining the duration of the period to which the wage penalty applies under 46 U.S.C. § 596.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE DISTRICT COURT AND COURT OF APPEALS

Petitioner, Danny L. Griffin

Respondent, Oceanic Contractors, Inc.
(now McDermott International, Inc.)

Respondent's Parent Corporation,
McDermott, Inc.

Respondent's Subsidiaries and Affiliates,
Badya Builders, Inc.
Creole Insurance Company, Ltd.
Honore Insurance Company, Ltd.
Jaramac Associated Services, Ltd.
J. Ray McDermott (Aust.) Pty, Ltd.
J. Ray McDermott (U.K.) Inc.
J. Ray McDermott London, Ltd.
Malmac Sdn. Bhd.
McDermott Far East, Inc.
McDermott (Malaysia) Sdn. Bhd.
McDermott Servicos de Construcao, Ltda.
McDermott West Indies Company
Oceanic Red Sea Company
P. T. Batam Fabricators
P. T. McDermott Indonesia
Sharman, Allen, Gay & Taylor, S.A.
Chartering Company (Singapore), Pte. Limited

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NO. 81-614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DANNY L. GRIFFIN,
Petitioner

v.

OCEANIC CONTRACTORS, INC.,
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT

To The Honorable Chief Justice And The Associate Justices Of The Supreme Court:

Respondent, Oceanic Contractors, Inc. (hereinafter referred to as "Oceanic"), respectfully submits this its Brief in Opposition to Petitioner's Petition for Writ of Certiorari and respectfully prays that the Court deny issuance of the writ.

OPINIONS BELOW

Petitioner's references to the opinions of the courts below are correctly stated.

JURISDICTION

Respondent acknowledges that the Court has discretionary jurisdiction to grant the writ under 28 U.S.C.

§ 1254(1), but Respondent submits that there are no "special and important reasons," as required by Rule 17.1 of the Rules of the Supreme Court of the United States, for issuing a writ in this case.

STATUTE INVOLVED

46 U.S.C. § 596

The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seaman of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts. R.S. § 4529; Dec. 21, 1898, c. 28 §§ 4, 26, 30, Stat. 756, 764; Mar. 4, 1915, c. 153, § 3, 38 Stat. 1164.

STATEMENT OF THE CASE

On February 18, 1976, Petitioner Danny L. Griffin, signed an employment agreement with Respondent to serve as a pipeline welder on board the LAY BARGE 27, a special purpose vessel designed and outfitted for the assembly and installation of marine pipelines in the North Sea. In accordance with the terms of the employment agreement, Respondent deducted the sum of $137.50 from each of Petitioner's first three paychecks to provide funds for his transportation home should Petitioner terminate his employment prior to completion of his contract.

Shortly after entering into the employment agreement, Petitioner traveled to Antwerp, Belgium to join LAY BARGE 27 which had been laid up in that port during the winter months. While working on board the vessel in the harbor on April 1, 1976, making the vessel ready for the new pipe laying season, Petitioner developed thrombosed hemorrhoids when he attempted to move an oxygen bottle. On April 3, 1976, a partial hemorrhoidectomy was performed on Petitioner in a hospital in Antwerp. Petitioner returned to his home in Houston, Texas on April 6, 1976 where he received further treatment for his condition. Petitioner reached maximum medical recovery and was determined to be fit to return to duty on May 3, 1976. Petitioner accepted employment by another employer as a welder on May 5, 1976 at a higher rate of pay than he was receiving from Respondent.

Petitioner subsequently brought suit in the United States District Court for the Eastern District of Texas against Respondent under the Jones Act, general maritime law, and 46 U.S.C. § 596, seeking recovery of maintenance and cure, repatriation expenses, earned and

unearned wages and penalties. The district court found that Respondent's vessel was unseaworthy due to an insufficient number of crew members, and that Petitioner's injury resulted from this unseaworthy condition in that he had no aid in moving the oxygen bottle. The court awarded Petitioner damages totalling $23,670.40, as follows: (1) $5913.68 as recovery for maintenance and cure, earned and unearned wages, repatriation expense, and the value of lost personal effects; (2) $2,506.89 as prejudgment interest on the recovery in item (1) above; (3) $3,368.23 as attorneys fees for the recovery in item (1) above; (4) $5,000.00 as recovery for pain and suffering; and (5) $6,881.60 as recovery of statutory penalty for earned but unpaid wages.

The district court found that a total of $412.50 had been retained by Respondent from Petitioner's first three pay checks pursuant to the employment agreement provision calling for withholding of $137.50 from each of his first four paychecks to provide for return transportation funds. The court further determined that these funds were not paid to Petitioner upon his leaving the employ of Respondent and that such failure to pay was without sufficient cause. It was in respect to this $412.50 that the court awarded the $6881.60 statutory penalty pursuant to 46 U.S.C. § 596. The district court determined that the appropriate period for assessment of the statutory penalty was from April 1, 1976, the date the Petitioner left the employ of Respondent, through May 5, 1976, the date the Petitioner became re-employed following his recovery. The discharge, though effective April 1, 1976, was done retroactively on June 2, 1976 when notice of the discharge was transmitted to Petitioner by Respondent. Respondent had held Petitioner's job open for him until

June 1, 1976, and had made numerous unsuccessful attempts to contact Petitioner for the purpose of ascertaining when he would report back to work.

Respondent paid the judgment on September 17, 1980. The satisfaction of judgment is dated that date and is attached hereto as Appendix I.

Petitioner appealed various elements of the district court's judgment to the United States Court of Appeals for the Fifth Circuit. The court of appeals affirmed the decision of the district court.

The sole issue being presented by Petitioner to this Court involves the amount of the statutory penalty awarded by the district court pursuant to 46 U.S.C. § 596.

SUMMARY OF ARGUMENT

A district court may exercise its discretion in determining the period to which the statutory penalty provided by 46 U.S.C. § 596 is to be applied. The Petition for Writ of Certiorari should be denied because the decisions of the United States District Court for the Eastern District of Texas and the United States Court of Appeals for the Fifth Circuit are correct.

ARGUMENT

The district court, recognizing the Congressional intent underlying 46 U.S.C. § 596, awarded Petitioner $6,881.60 as a statutory penalty on the earned but unpaid wages of $412.50, exercising its discretion in determining the period to which the statutory penalty applied. The court of appeals below found no abuse of discretion by the trial judge and affirmed his actions in all respects.

As this Court stated in *Collie v. Fergusson,*[1] in examining the Congressional intent underlying 46 U.S.C. § 596:

> [T]he evident purpose of the Section [is] to secure prompt payment of seamen's wages (H.R. Rep. 1657, Committee on the Merchant Marine and Fisheries, 55th Cong., 2d Sess.), and thus to protect them from the harsh consequences of arbitrary and unscrupulous action[s] of their employers, to which, as a class, they are peculiarly exposed.[2]

This Court has recently reaffirmed the foregoing as the Congressional intent underlying 46 U.S.C. § 596 in *American Foreign S.S. Co. v. Matise.*[3] Both the district court[4] and the court of appeals[5] below recognized and acknowledged this as the policy underlying the statutory provision they were called upon to apply. The decisions of both courts were rendered in light of this policy.

Perhaps the most fundamental and significant rule of law applicable in instances in which a court is called upon to apply a statutory provision to a given set of facts is that the statute is to be applied and interpreted in such a way as to effectuate the legislative intent underlying the particular statute.[6] Petitioner would require the courts to

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1. 281 U.S. 52 (1930).

2. *Id.* at 55.

3. 423 U.S. 150 (1975), *reh. denied* 424 U.S. 929.

4. *Griffin v. Oceanic Contractors, Inc.*, C.A. No. S-78-26 Conclusion of Law No. 11 (E.D. Tex. 1980).

5. *Griffin v. Oceanic Contractors, Inc.*, No. 80-1599 Summary Calendar (5th Cir. 1981).

6. *See, e.g.*, Cardozo, THE NATURE OF THE JUDICIAL PROCESS, 120, 140 (1921); L. Hand, *How Far Is a Judge Free in Rendering A Decision?* In Law Series I, Lect. No. 14, National Advisory Council on Radio in Education (Un. of Chi. Press, 1933), (cited in *Usatorre v. The VICTORIA*, 172 F.2d 434 (2d Cir. 1949)):

ignore the Congressional intent underlying 46 U.S.C. § 596 and apply the statute slavishly and blindly. Such a proposition ignores a long line of precedent reflecting

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> [T]here are two extreme schools, neither one of which is really willing to apply its theory consistently, usually applying it when its interests lie along the path it advocates. One school says that the judge must follow the letter of the law absolutely. I call this the dictionary school. No matter what the result is, he must read the words in their usual meaning and stop where they stop. No judges have carried on literally in that spirit, and they would not be long tolerated if they did. . . . The other school would give them almost complete latitude. They argue that a judge should not regard the law; that this has never really been done in the past, and that to attempt ever to do it is an illusion. He must conform his decision to what honest men would think right, and it is better for him to look into his own heart to find out what that is. As I have already said, in a small way some such process is inevitable when one is interpreting any written words. When a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right. Let him beware, however, or he will usurp the office of government, even though in a small way he must do so in order to execute its real commands at all. . . . But the judge must always remember that he should go no further than he is sure the government would have gone, had it been faced with the case before him. If he is in doubt, he must stop, for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the result should be. He is not to substitute his even juster will for theirs; otherwise it would not be the common will which prevails and to that extent the people would not govern. So you will see that a judge is in a contradictory position; he is pulled by two opposite forces. On the one hand he must not enforce whatever he thinks best; he must leave that to the common will expressed by the government. On the other, he must try as best he can to put into concrete form what that will is, not by slavishly following the words but by trying honestly to say what was the underlying purpose expressed. Nobody does this exactly right; great judges do it better than the rest of us. It is necessary that someone shall do it, if we are to realize the hope that we can collectively rule ourselves.

See also Cox, Learned Hand and the Interpretation of Statutes, 60 HARV. L. REV. 370 (1947); Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COL. L. REV. 527 (1947).

sound, logical reasoning that courts should use their intelligence and common sense in applying or interpreting statutes so as to bring about the effect the legislative branch intended.[7] Petitioner would forbid the courts to exercise any discretion in performing their judicial function. Such a proposition is neither sound nor sensible. Such a proposition was not intended by the drafters of the statute under consideration herein.

Title 46 U.S.C. § 596 provides that the statutory penalty will apply where the wages of a seaman are withheld "without sufficient cause."[8] This Court has held that that phrase must necessarily contemplate more than a valid defense to the claim for wages as the phrase would otherwise not have added anything to the statute.[9] This Court has recognized the validity of a number of lower court decisions denying penalty liability for a variety of reasons including instances where the refusal to pay is in some reasonable degree morally justified.[10]

This Court in *Pacific Mail S.S. Co. v. Schmidt*,[11] recognized that the penalty period provision of the statute was subject to judicial interpretation and definition. The wages at issue there were improperly withheld, that is, technically withheld "without sufficient cause," but the Court through Mr. Justice Holmes suspended the penalty

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7. *See, e.g., Usatorre v. The VICTORIA*, 172 F.2d 434 (2d Cir. 1949); *Eyston v. Studd*, 2 Plowden 450, 465-67, 75 Eng. Rep. 688, 695-699 (1574).

8. *Collie v. Fergusson*, 281 U.S. 52, 55 (1930).

9. *Id.*

10. *Id.* at 56.

11. 241 U.S. 245 (1916).

during the pendency of the appeal of the district court's decision, recognizing the equities involved, stating:

> It is a very different thing [than the determination of whether the wages were withheld without sufficient cause], however, to say that the delay occasioned by the appeal was not for sufficient cause. Even on the assumption that the petitioner was wrong, [the respondent] had strong and reasonable ground for believing that the statute ought not to be held to apply. So that the question before us is whether we are to construe the Act of Congress as imposing this penalty during a reasonable attempt to secure a revision of doubtful questions of law and fact, although its language is "neglect . . . without sufficient cause." The question answers itself. We are not to assume that Congress would attempt to cut off the reasonable assertion of supposed rights by devices that have had to be met by stringent measures when practised by the states. Ex parte Young, 209 U.S. 123, 52 L.Ed. 714, 13 L.R.A. (N.S.) 932, 28 S.Ct. Rep. 441, 14 Ann. Cas. 764. There was sufficient cause for the neglect to pay after the decree of the district court, since the payment of the original wages without the penalty that was reasonably in dispute would neither have been accepted nor allowed.[12]

Four United States courts of appeal[13] and various dis-

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12. *Id.* at 250-51.

13. *Mavromatis v. United Greek Shipowners Corporation,* 179 F.2d 310 (1st Cir. 1950); *Forster v. Oro Navigation Co.,* 228 F.2d 319 (2d Cir. 1955), *aff'g* 128 F. Supp. 113 (S.D. N.Y. 1954); *Southern Cross S. S. Co. v. Firipis,* 285 F.2d 651 (4th Cir. 1960), *cert. denied* 365 U.S. 869 (1961); *Prindes v. S. S. AFRICAN PILGRIM,* 266 F.2d 125 (4th Cir. 1959); *Mystic S.S. Co. v. Stromland,* 20 F.2d 342 (4th Cir. 1927); *Caribbean Federation Lines v. Dahl,* 315 F.2d 370 (5th Cir.), *cert. denied* 375 U.S. 831 (1963).

trict courts[14] have correctly interpreted and applied 46 U.S.C. § 596 in light of *Pacific S.S. Co. v. Schmidt,* exercising their judicial discretion in determining whether a withholding is with or without sufficient cause and, if without sufficient cause, in determining the appropriate penalty period. These courts have uniformly held that the time for which the penalty provision runs shall rest within the sound discretion of the court, depending upon and to be determined by the equities of the particular case.

The only cases, relied upon by Petitioner herein, which reject this clear and consistent line of authority are *Swain v. Isthmian Lines, Inc.,*[15] *Escobar v. S.S. WASHINGTON TRADER,*[16] *Thomas v. S.S. SANTA MERCEDES,*[17] and *Larkins v. Hudson Waterways Corp.*[18] The court of appeals in *Escobar* accepted the reasoning of the court of appeals in *Swain* without commenting upon the rationale of the *Swain* decision. *Thomas* and *Larkin* were decided upon the precedential effect of *Escobar.* Consequently, *Swain* is the only decision which provides any arguable basis for rejecting the rule adopted by the four other courts of appeal.

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14. *Ventiadis v. C. J. Thibodeaux & Co.,* 295 F. Supp. 135 (S.D. Tex. 1968); *Kontos v. S.S. SOPHIE C,* 236 F. Supp. 664 (E.D. Pa. 1964); *Spero v. The ARGODON,* 150 F. Supp. 1 (E.D. Va. 1957); *Samad v. The ETIVEBANK,* 134 F. Supp. 530 (E.D. Va. 1955); *The VICTORIA,* 76 F. Supp. 54 (S.D.N.Y. 1947), *rev'd on other grounds sub nom. Usatorre v. The VICTORIA,* 172 F.2d 434 (2d Cir. 1949); *The CHESTER,* 25 F.2d 908 (D. Md. 1928).

15. 360 F.2d 81 (3d Cir. 1966).

16. 503 F.2d 271 (9th Cir. 1974), *vacated and remanded on other grounds* 423 U.S. 1070 (1976).

17. 572 F.2d 1331 (9th Cir. 1978).

18. 640 F.2d 997 (9th Cir. 1981).

A close review of the *Swain* case will disclose that that court improperly interpreted the decision of Mr. Justice Holmes in *Pacific Mail S.S. Co. v. Schmidt*,[19] terming that decision "sui generis" when in fact that case does stand for the proposition that the judiciary has authority to exercise discretion in determining the time for which the penalty provision of 46 U.S.C. § 596 runs.[20] The court of appeals in *Swain*, and the subsequent cases relying on it, concluded that "the language of Section 596 must be read as a mandatory command to the judiciary."[21] If that is in fact true, no adjustment of the penalty period for any reason would ever be permissible. Under this Court's prior decision in *Pacific Mail S.S. Co. v. Schmidt*, that is simply not the interpretation this Court has given to § 596. The United States Court of Appeals for the Third Circuit wrongly decided *Swain* because of its misinterpretation of Mr. Justice Holmes' opinion in *Pacific Mail S.S. Co. v. Schmidt*. The subsequent cases relying on *Swain* are, consequently, also wrongly decided.

CONCLUSION

The decisions of the district court and the court of appeals below correctly apply and interpret 46 U.S.C. § 596 under the precedent of this Court and of the majority of the courts of appeals and the district courts which have considered the issue. Such an approach is consistent with the judicial obligation to interpret and apply a statute so as to effectuate its purpose. This is precisely what was done in the instant case by the courts

19. 241 U.S. 245.

20. *Id.* at 250-51.

21. 360 F.2d at 88.

below. The decisions of the United States District Court for the Eastern District of Texas and the United States Court of Appeals for the Fifth Circuit are correct.

WHEREFORE, PREMISES CONSIDERED, Respondent Oceanic Contractors, Inc. respectfully prays that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Theodore Goller

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief for Respondent was served upon Mr. Benton Musslewhite, 3506 Travis, Houston, Texas 77002, attorney for Petitioner, by mailing three (3) copies of same to him in the United States mail, first class postage prepaid, this 14th day of October, 1981, and that he is the attorney for the only other party to be served in this matter.

Theodore Goller

THEODORE GOLLER

Appendix

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

C. A. NO. A-78-26-CA

DANNY L. GRIFFIN,
Plaintiff,

vs.

OCEANIC CONTRACTORS, INC.,
Defendant.

SATISFACTION OF JUDGMENT

Payment in full by defendant, Oceanic Contractors, Inc., of all amounts due therefrom under the final judgment entered herein on the 7th day of May, 1980, is hereby acknowledged, and satisfaction full and complete and acquittance in full, including interest, is hereby given, except as to costs of court and such additional sums, if any, that may be awarded to the plaintiff by the United States Court of Appeals for the Fifth Circuit or the Supreme Court of the United States.

DATED at Houston, Texas, this 17th day of September, 1980.

/s/ Danny L. Griffin
DANNY L. GRIFFIN
Plaintiff

FRIEDMAN & CHAFFIN

By /s/ Robert A. Chaffin
Attorneys for Plaintiff,
Danny L. Griffin

Petitioner's Brief

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. 81-614

DANNY L. GRIFFIN,
Petitioner

v.

OCEANIC CONTRACTORS, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeals' holding that the duration of time for which penalty wages are awarded seamen under 46 U.S.C. § 596 is left to the equitable discretion of the trial court is erroneous inasmuch as the Third and Ninth Circuits have previously held that the trial court is mandatorily bound to assess penalty wages for the exact time period called for by 46 U.S.C. § 596.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE DISTRICT COURT AND CIRCUIT COURT

Petitioner, Danny L. Griffin

Respondent, Oceanic Contractors, Inc.
(now McDermott International, Inc.)

Respondent's Parent Corporation,
McDermott, Inc.

Respondent's Subsidiaries and Affiliates,
Badya Builders, Inc.
Creole Insurance Company, Ltd.
Honore Insurance Company, Ltd.
Jaramac Associated Services, Ltd.
J. Ray McDermott (Aust.) Pty, Ltd.
J. Ray McDermott (U.K.) Inc.
J. Ray McDermott London, Ltd.
Malmac Sdn. Bhd.
McDermott Far East, Inc.
McDermott (Malaysia) Sdn. Bhd.
McDermott Servicos de Construcao, Ltda.
McDermott West Indies Company
Oceanic Red Sea Company
P. O. Batam Fabricators
P. O. McDermott Indonesia
Sharman, Allen, Gay & Taylord, S.A.
Chartering Company (Singapore), Pte. Limited

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. 81-614

DANNY L. GRIFFIN,
Petitioner

v.

OCEANIC CONTRACTORS, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

CITATIONS TO THE OPINIONS AND JUDGMENTS OF THE LOWER COURTS

Griffin v. Oceanic Contractors, Inc., C.A. No. S-78-26 (E.D. Tex. May 6, 1980).

Griffin v. Oceanic Contractors, Inc., ____F.2d____ (5th Cir. 1981).

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on June 17, 1981. No petition for rehearing or rehearing en banc was thereafter filed. Petitioner filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on September 14, 1981. The Honorable Court granted the petition on November 16, 1981.

STATUTE INVOLVED

46 U.S.C. § 596

The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seaman of which are entitled

to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts. R.S. § 4529; Dec. 21, 1898, c. 28 §§ 4, 26, 30, Stat. 756, 764; Mar. 4, 1915, c. 153, § 3, 38 Stat. 1164.

STATEMENT OF THE CASE

This is a seaman's case brought by Petitioner, Danny Griffin, against Respondent, Oceanic Contractors, Inc., as a result of personal injuries sustained by Petitioner on April 1, 1976 while serving on Respondent's vessel, LAY BARGE 27. Petitioner brought suit to recover damages for his injuries under the Jones Act, 46 U.S.C. § 688 and the general maritime law of the United States as well as for penalty wages under 46 U.S.C. § 596 (J.A. 4-10). The trial court found that Petitioner had suffered injuries solely as the result of an unseaworthy condition of the LAY BARGE 27 (J.A. 23). In addition, the trial court found that Respondent failed to timely pay Petitioner his wages as required by 46 U.S.C. § 596. Pursuant to findings of fact and conclusions of law rendered by the trial court, judgment for Petitioner was entered (J.A. 28-29). Petitioner timely perfected his appeal to the Fifth Circuit Court of Appeals which in turn affirmed the trial court in all respects (J.A. 32-40). Although Petitioner sought review of multiple elements of the trial court's holding, the only issue preserved for this Court is the duration of the time period for which penalty wages should be awarded under 46 U.S.C. § 596.

On February 18, 1976, Petitioner signed an employment agreement (J.A. 41-50) with the Respondent whereby he agreed to work as a senior pipeline welder onboard the LAY BARGE 27, a special purpose vessel owned by the Respondent whose mission was to assemble and

install marine pipelines in the North Sea. The employment agreement was to begin on the date Petitioner departed the United States and extend until December 15, 1976, or until Respondent's 1976 pipeline committal in the North Sea was fulfilled, whichever occurred first. (J.A. 14).

The same day Petitioner signed his employment agreement, he was ordered by the Respondent to report for a physical examination. After passing his physical examination, Petitioner was provided air transportation to Antwerp, Belgium where LAY BARGE 27 was undergoing winter repairs. On March 10, 1976 Petitioner became a member of the crew of the LAY BARGE 27. (J.A. 22).

In late winter and early spring the North Sea is an extremely inclement and hostile body of water. Heavy seas and high winds are the rule rather than the exception. In order for the LAY BARGE 27 to begin its mission as early in the year as possible, Respondent followed the practice of having barge crews work onboard approximately one month ahead of the time that the barge actually put to sea, in order to make the barge ready for seagoing service. As soon as the North Sea was calm enough and the barge was made ready by its crew, LAY BARGE 27 would put to sea and begin its pipe laying season (J.A. 16).

On April 1, 1976 Petitioner suffered traumatic thrombosed hemorrhoids while attempting to move an empty oxygen bottle in order to replace it with a full bottle. The injury occurred while Petitioner was by himself attempting to move an oxygen bottle, weighing approximately 125 to 150 pounds. Although it was customary for this work to be performed by a welder's helper, the LAY

BARGE 27 was shorthanded at the time. The trial court found that the accident of April 1, 1976 resulted solely through an unseaworthy condition of the vessel, i.e. the failure to provide a sufficient number of competent crew members. Neither party contested the trial court's findings of fact in this regard. (J.A. 16-17, 23).

As a result of his injuries Petitioner was forced to leave the vessel and seek medical care at the seaman's clinic in Antwerp. Following the advice of the clinic doctor Petitioner spent the evening of April 1, 1976 in a local hotel where he took sitz baths for treatment of his condition. The condition worsened overnight and Petitioner was hospitalized on April 2, 1976 at Ziekenhuis Vesalius Hospital in Antwerp where he underwent emergency surgery on April 3, 1976. Petitioner departed the hospital and attempted to return to LAY BARGE 27 shortly before noon on April 5, 1976. (J.A. 17, 23).

From the hospital, Petitioner went directly to Respondent's office in Antwerp and met with Jesse Williams, the Respondent's supervisor for all of the welder foremen and pipeline welders in the North Sea. Mr. Williams was permanently stationed at Respondent's Antwerp office. (J.A. 18). Petitioner presented himself to Mr. Williams, along with a "not fit for duty" slip given to him by the physician who had discharged him from the hospital. Williams arbitrarily denied that Petitioner was injured onboard LAY BARGE 27 and denied that Respondent was liable in any way for Petitioner's medical expenses and maintenance. (J.A. 18). Notwithstanding Petitioner's injuries and discharge in a foreign port, Williams refused to pay the Petitioner his earned wages after proper demand and refused to furnish Petitioner transportation from Antwerp,

Belgium to Houston, Texas. Such inequitable conduct on the part of Williams, while in the course and scope of his employment with Respondent, constituted arbitrary, unreasonable, callous and willful disregard for Petitioner's rights by the Respondent. (J.A. 18, 27).

Petitioner's employment agreement with Respondent (J.A. 19) provided that Respondent would deduct $137.50 from each of Petitioner's first four pay checks to cover the cost of return transportation to the United States should the employment relationship be terminated before the contract expired. Respondent deducted and held a total of $412.50 from the earned wages of Petitioner during March and April of 1976. (J.A. 19, 24). Petitioner made timely demand for his wages before leaving Belgium and repeatedly thereafter.

Petitioner's demands were wrongfully refused by Respondent and Petitioner was thereby left alone in a foreign port without his earned wages and injured to such a degree that he was temporarily incapacitated. Petitioner was effectively abandoned in a foreign country, injured, unable to work, without his earned wages and left to his own resources to find a way back to this country. (J.A. 19). Respondent's failure to pay Petitioner his earned wages at the time of discharge was without sufficient cause, (J.A. 20, 25) and constituted arbitrary, unreasonable, callous and willful disregard of Petitioner's rights. (J.A. 20, 27).

Petitioner paid his own expenses home. (J.A. 19). He arrived in Houston, Texas on April 6, 1976 and was examined by Ernest Max, M.D., a colon and rectal surgeon in Houston, Texas on April 6, 1976. Dr. Max signed a written statement that Petitioner was fit for duty

beginning May 3, 1976. Petitioner reached maximum medical cure at that time and returned to work on May 5, 1976 for another offshore contractor. (J.A. 19).

Due diligence was at all times exercised by Petitioner in attempting to collect his earned wages from Respondent, who did not even begin a thorough investigation of Petitioner's claim until September 30, 1976; over six months from the date of Petitioner's injury. (J.A. 20). Respondent has never claimed lack of notice of Petitioner's claim, nor complained of delay in making that claim. Respondent's recalcitrance in recognizing and responding to its legal obligations forced the Petitioner to obtain counsel and go to court to recover what was clearly owed to him. (J.A. 20). Subsequent to bringing suit Respondent was further advised by letter of November 17, 1978 from Petitioner's counsel that earned wages were unpaid and owing and that failure to pay Petitioner his earned wages would result in substantial penalty under 46 U.S.C. § 596. (J.A. 51-56). Respondent should have made these payments voluntarily and without delay, knowing full well that Petitioner was indeed entitled to receive the full amount of wages due him.

Petitioner also exercised due diligence in attempting to collect unearned wages, maintenance, cure, repatriation expenses and the value of lost personal effects aboard the LAY BARGE 27. Respondent failed to pay Petitioner's medical expenses incurred in Antwerp, Belgium, forcing Petitioner to pay out of his own pocket for medical treatment made necessary by his injury. Respondent also failed to voluntarily pay Petitioner's maintenance, unearned wages, repatriation expenses and the value of his lost personal effects aboard the barge. The trial court found that Respondent's failure to pay each of

these items constituted arbitrary, unreasonable, callous and willful conduct with total disregard for the rights of Petitioner. Further, the trial court awarded attorney's fees to the Petitioner on the basis of Respondent's arbitrary conduct and Respondent's failure to investigate Petitioner's claim with due diligence. (J.A. 27).

The sole dispute left unresolved to the satisfaction of Petitioner is the amount of penalty wages awarded by the trial court. Petitioner sought imposition of the penalty for the period April 1, 1976 (date of discharge) through May 6, 1980 (date of judgment). However, the trial court saw fit to award the penalty only for that period of time beginning with Petitioner's discharge from the vessel, April 1, 1976, and terminating on the date Petitioner was reemployed, May 5, 1976, this being 34 days. The trial court found it proper to exercise equitable discretion and shorten the double wage penalty to a lesser period than that explicitly provided by the statute. Petitioner would pray this Honorable Court to reverse the trial court and render judgment for the Petitioner in the full amount prescribed by the plain language of 46 U.S.C. § 596. (J.A. 25).

SUMMARY OF ARGUMENT

Congress intended to create a mandatory form of liquidated damages in order to effectuate the legislative intent behind 46 U.S.C. § 596, i.e., to protect seamen from the harsh consequences of arbitrary and unscrupulous action of their employers and to punish abusive conduct on the part of those employers. Once the requirements of a cause of action under 46 U.S.C. § 596 have been satisfied, the standard for determining the length of time

penalty wages must be awarded is a mandatory one, requiring payment of penalty wages for each and every day payment is delayed. Since Congress decided that a penalty is proper, the statute must be read as a mandatory command to the judiciary. Any apparent harshness or severity to the shipowner resulting from the literal application of 46 U.S.C. § 596 is purely illusory since the penalty may be tolled at any time by a tender of the disputed wage claim into the registry of the court.

ARGUMENT

I.

CONGRESS INTENDED TO CREATE A MANDATORY FORM OF LIQUIDATED DAMAGES THROUGH ENACTMENT OF 46 U.S.C. § 596 IN ORDER TO PROTECT SEAMEN FROM THE HARSH CONSEQUENCES OF ARBITRARY AND UNSCRUPULOUS ACTION OF THEIR EMPLOYERS AND TO PUNISH ABUSIVE CONDUCT ON THE PART OF SHIPOWNERS.

This case concerns Petitioner's claim to a statutory penalty under 46 U.S.C. § 596. Respondent refused and neglected without sufficient cause to timely pay Petitioner his earned wages after discharge from Respondent's employ thereby libeling Respondent for penalty wages pursuant to 46 U.S.C. § 596. The single question presented by Petitioner for this Honorable Court's consideration is the appropriate time standard for imposition of the penalty to be assessed under 46 U.S.C. § 596 once the penalty has been triggered?

As a foundation for argument concerning the proper standard for assessing the penalty, it is appropriate to discuss the purposes behind the statute and the legislative intent of Congress in enacting 46 U.S.C. § 596. The purpose of 46 U.S.C. § 596, in light of the statute's legislative history and the construction given to it by the judiciary, is for the benefit and welfare of seamen, both American and foreign; to "secure prompt payment of seamen's wages (H.R. Rep. 1657, Committee on the Merchant Marine and Fisheries, 55th Congress, 2d session), and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed."[1]

This Honorable Court speaking through Mr. Justice Stone in *Collie v. Ferguson*,[2] described the purpose of the statute as not exclusively compensatory, but, "designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible".[3] The statute is thus clearly directed toward the conduct of shipowners as an attempt to produce prompt, affirmative action. Double wages are awarded as compensation[4] even though the award of compensation is in the nature of a penalty.[5] However, the essential spirit

1. *Collie v. Ferguson*, 281 U.S. 52, 55-56 (1930).

2. Id. at 52.

3. Id. at 55-56.

4. *Cox v. Lykes Bros.*, 237 N.Y. 376, 143 N.E. 226 (1924).

5. *Buckley v. Oceanic S.S. Co.*, 5 F.2d 545 (9th Cir. 1925); *Alier v. Sea Land Service, Inc.*, 465 F.Supp. 1106 (D. Puerto Rico, 1979); *The American Shipper*, 3 F.Supp. 184 (S.D. N.Y.) aff'd. 70 F.2d 632 (2d Cir. 1932) aff'd. sub nom *McCrea v. United States*, 294 U.S. 23 (1934).

and purpose of this statute is to financially punish the master and owner for failure to timely pay wages without sufficient cause. Support for this punitive construction is further gleaned from the fact that the amount assessed may be far out of proportion to the actual unpaid wages.[6] The maritime industry itself regards the statute as a penalty.

This penalty feature of the statute is precisely what Congress had in mind to motivate shipowners to exercise due care in computing and promptly paying wages rightfully due a seaman. Thus, the statute as written by Congress was given a coercive provision, the double wage penalty, designed to be an effective deterrent to recalcitrant shipowners and to prevent the penniless abandonment of seamen discharged in foreign ports. *Swain v. Isthmain Lines, Inc.*[7] followed this construction.

> [A]s we view it, it is precisely the possibility that large penalties will accrue that should motivate a shipowner to exercise care in computing wages due a seaman. We think that this deterrent was what Congress had in mind in providing for a penalty in the form of inflexible liquidated damages.[8]

Given the protective and punitive purposes of 46 U.S.C. § 596, this Honorable Court must decide the proper interpretation and application of the statute to the facts so as to effectuate these purposes. Congressional legislation in aid of seamen is largely remedial and historically calls for liberal interpretation in favor of seamen as the wards

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6. 1 Norris, *The Law of Seamen*, § 383, p. 460 (3rd ed. 1970).
7. 360 F.2d 81 (3rd Cir. 1966).
8. Id. at 87.

of admiralty.[9] "The right to prompt payment of a seaman's wages is especially favored by admiralty law. The Courts strongly disapprove denial of prompt payment of seaman's wages rightfully due him. The wage statutes are to be liberally construed in favor of the seaman."[10]

Interpretation of remedial legislation must be made in light of the fundamental rules of statutory construction set forth in *Isbrandsten,*[11] a previous decision of this Honorable Court dealing with this same statute which offers firm precedent. The courts should give a

> [N]atural meaning to legislation like this that obviously is of a remedial, beneficial and amendatory character. It should be interpreted so as to effect its purpose. Marine legislation, at least since the Shipping Commissioners Act of June 7, 1872, 17 Stat. 262, should be construed to make effective its design to change the general maritime law so as to improve the lot of seamen.[12]

46 U.S.C. § 596 should be interpreted and applied in such a way as to carry out and fulfill the legislative intent underlying this statute.

The words of a statute are the most important single factor in determining its intent and purpose. Where the statute contains plain and unambiguous language the judiciary

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9. *Isbrandtsen Co. v. Johnson*, 343 U.S. 779 (1952). *The Herdis*, 22 F.2d 304, 306 (D. Md. 1927) spells out the proper judicial policy to be applied. "It is an historic axiom of admiralty courts that seamen shall be accorded special consideration and protection. So any ambiguity in the words of the statute should, if reasonable to do so, be resolved in their favor."

10. *Arguelles v. U.S. Bulk Carriers, Inc.*, 408 F.2d 1065 (4 Cir. 1969) aff'd. sub nom. *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351 (1971).

11. 343 U.S. 779 (1952).

12. Id. at 783.

is not free to substitute its judgment for that of the legislature. Such is the case with 46 U.S.C. § 596. Despite the plain language of the statute certain courts have seen fit to judicially amend its application merely because they disagreed with the result produced by a literal application of the statute. Once the legislature has spoken the role of the judiciary must become subordinate to that of the legislature where the plain language of a properly enacted statute dictates a definite result. Enforcement of the statute should be the sole job of the judiciary with amendments based upon results desired entrusted to the Congress.[13]

An examination of the legislative history of the statute reveals that the penalty provision is intended to protect seamen by penalizing unlawful conduct on the part of shipowners. The forerunner of 46 U.S.C. § 596 was the Act of July 20, 1790,[14] known as an Act For The Government And Regulation Of Seamen In The Merchant Service, which Congress legislated for the benefit of seamen. For the further protection of seamen and their wages, Congress passed the Act of June 7, 1872,[15] which provided a penalty in case of refusal or neglect to timely pay wages without sufficient cause of a sum not exceeding two days pay for a maximum of ten days.

From the original Act of July 20, 1790 and the Act of June 7, 1872 proceeded R.S. § 4529.[16]

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13. Cox, *Learned Hand and the Interpretation of Statutes*, 60 Harv.L.Rev. 370 (1947).

14. Act of July 20, 1790, chap. 29, § 6, 1 Stat. 133. (reprinted at Appendix A).

15. Act of June 7, 1872, chap. 322, § 35, 17 Stat. 269. (reprinted at Appendix B).

16. Revised Statutes, § 4529 (1878) (current version at 46 U.S.C. § 596). [reprinted at Appendix C].

In 1898 the Senate Committee on Commerce introduced Senate Bill 95[17] to amend the laws relating to American seamen for the protection of such seamen and to promote commerce. This bill as amended became the Act of December 21, 1898.[18] By virtue of section 4 of this act, R.S. § 4529 was amended so that the sum due for neglecting or refusing to pay was fixed as one day's pay for each day's delay and the amount due every seaman upon discharge was increased from one-fourth to one-third part of wages. The ten day limitation period was deleted from the statute.

In 1915 the law was again amended by the passage of both Houses in Congress of Senate Bill 136[19] designed to promote the welfare of American seamen in the merchant marine of the United States.[20] The penalty was changed to two day's pay for each day of delay. Senate Bill 136 was amended by the House and a conference was appointed to resolve the deadlock between the House and Senate. At the Senate debate on Conference Report No. 1439, the purpose of the bill was ably expressed by Senator Vardaman:

> [T]o protect from the exactions of conscienceless greed the men who do the work, who operate the ships, and give them larger liberty and make the vocation more attractive to self-respecting men; to elevate the standard of manhood, and in that way improve the efficiency of the men and, consequently benefit the entire world.

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17. S. 95, 55th Cong., 2d Sess. (1898).

18. Act of December 21, 1898, chap. 28, §§ 4, 26, 30 Stat. 756. (reprinted at Appendix D).

19. S. 136, 63rd Cong., 3rd Sess. (1915).

20. Act of March 4, 1915, chapter 153, sec. 3, 38 Stat. 1164.

> I cannot for the life of me see how any man who loves his fellow man can object to securing to the sailor those rights, those privileges, those immunities which are provided in this bill. It is only doing scant justice to a long suffering class of patient toilers. It cannot hurt business. No business is entitled to prosper upon injustice and wrong.
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> I sometimes think that the cheapest thing in the world, in the estimation of the average man bent upon making money, is a human being. No more thought is given to him, no more care is taken of him than the piece of inanimate machinery he operates. He is a thing to be used, abused and cast aside when no longer needed by the man or corporation in whose service he is employed. I submit that no business has a right to prosper upon conditions and upon a system of that character, and that is all there is in this bill that any Senator can object to.[21]

The legislative history of the statute clearly demonstrates that Congress recognized the need and intended to protect seamen as a class against the abuses of their employers. This Honorable Court should strictly enforce the statute to effectuate this protection. The penalty provision has undergone several legislative changes since 1790 as Congress strove to improve and upgrade the lot of seamen.[22] As originally enacted, the penalty was to be a sum *not more than* the amount of two days' pay for each day, not exceeding ten, during which the payment was delayed. The not more than form of penalty when combined with the ten day maximum provided the courts with discretion in determining the length of time for which the penalty would accrue. By the Act

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21. 52 Cong. Rec. 4808 (Feb. 27, 1915).

22. See H.R. Report No. 1657, Committee on the Merchant Marine and Fisheries, 55th Congress, 2d Session (1898).

of December 21, 1898 Congress removed all discretionary aspects by changing the penalty to a sum equal to one day's pay for each day of delay. In 1915, the penalty was increased to a sum equal to two days' pay for each day of delay in wage payment by a master or shipowner without sufficient cause. Since 1915 the penalty wage statute has remained unchanged. It is entirely unreasonable to believe that Congress could not have foreseen that the statute would have severe results when applied to long periods of wrongful withholding.

Other sections[23] of the Shipping Commissioner's Act, are written with the *not more than* form of penalty, which provides an obvious flexibility to the judiciary in fixing the amount of the penalty awards under those sections. Sections 594 and 596, among others in the same act, are written in mandatory language, seemingly providing for no discretion in setting the penalty rate to be used in computing the penalty award. The Third Circuit has construed Section 594, containing a mandatory rate provision, as providing for damages "which have been liquidated by legislative enactment."[24] By using mandatory language in determining the penalty under 46 U.S.C. § 596, Congress intended to provide and create a penalty in the form of *inflexible liquidated damages* through a simple, statutory formula: double the daily wage for each day the failure to pay remains uncured.[25] Congress has obviously been aware of the potential severity of the penalty for many years.

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23. See, 46 U.S.C. §§ 546, 562, 563, 567, 568, 571, 577, 599, 623 (1965).

24. *Newton v. Gulf Oil Corporation*, 180 F.2d 491, 494 (3rd Cir.), cert. denied 340 U.S. 814 (1950).

25. *Swain v. Isthmian Lines, Inc.*, 360 F.2d 81 (3rd Cir. 1966).

Throughout its history the maritime law has made the ordinary seaman a member of a favored and protected class, a ward of admiralty. Congress has through its legislation shown its awareness of the need to protect seamen's rights and improve their conditions and surroundings, so that now federal legislation touches almost every facet of a seaman's life. 46 U.S.C. § 596 is a product of Congress' awareness of the need for protection of seamen and the punishment of shipowners who abuse them. The statute deals explicitly with those who fail without sufficient cause to pay seamen their earned wages by imposing a penalty. The statute must be construed liberally in favor of the seaman so as to effectuate the legislative intent of imposing upon shipowners a mandatory standard in determining the amount of the penalty under 46 U.S.C. § 596. Congress undoubtedly realized that the potential penalties under the statute could be severe, just as they realized the potential dangers to a seaman abandoned without his wages could be severe.

II.

ONCE THE REQUIREMENTS OF A CAUSE OF ACTION UNDER 46 U.S.C. § 596 HAVE BEEN SATISFIED, THE STANDARD FOR DETERMINING THE LENGTH OF TIME PENALTY WAGES ARE AWARDED IS A MANDATORY ONE, REQUIRING PAYMENT OF PENALTY WAGES FOR EACH AND EVERY DAY PAYMENT IS DELAYED.

In 1898, Congress removed both the ten day maximum limitation period and the *not more than* language from the statute. In so doing, Congress legislated out of the statute, the previously existing discretion the judiciary

enjoyed regarding the ultimate amount of the penalty, replacing it with a mandatory standard. Congress clearly intended that seamen should be paid their earned wages in full when their term of service was ended.[26]

46 U.S.C. § 596 provides that every master or owner who refuses or neglects to make payment of earned wages without sufficient cause at the time of the seaman's discharge must pay to the seaman two days pay for each and every day during which payment is delayed beyond the statutory period. The date that the seaman leaves the ship, either upon discharge or at the end of the voyage if discharge occurs before that time, fixes the time of the operation of the statute. Payment in full of the seaman's earned wages within 4 days after discharge in a foreign port fulfills the shipowner's responsibility and the statute is not triggered.

Without doubt, the question of sufficient cause and its function in the statutory scheme has received extensive treatment by the courts. In *Collie v. Ferguson,*[27] this Honorable Court defined the phrase "refuses or neglects to make payment . . . without sufficient cause" as referring to shipowner's conduct which is arbitrary or willful or a failure unrelated to inability to pay.[28] The phrase "without sufficient cause" means something more than a valid defense to a wage claim.[29] It means a willful, unreason-

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26. *The Cubadist,* 252 F. 658 (D. Ala. 1918), aff'd. 256 F. 203 (5th Cir.) cert. denied 249 U.S. 618 (1919).

27. 281 U.S. 52 (1930).

28. *Accord, Watler v. M/V Sea Lane,* 232 F.Supp. 387 (S.D. Fla. 1964).

29. *Collie v. Ferguson,* supra. No. 1.; *Forster v. Oro Navigation Co.,* 128 F.Supp. 113 (S.D. N.Y. 1954) aff'd 228 F.2d 319 (2d Cir. 1955).

able and arbitrary attitude and conduct on the part of the master or shipowner in failing to pay earned wages to a seaman. The penalty is thus triggered only by inequitable conduct on the part of the shipowner. Petitioner submits that once the provisions of section 596 are found to apply, as they have been in the present case,[30] then the judiciary is mandatorily bound to award the penalty in accordance with the Congressional intent and the clear language of the statute.[31]

Congress knowingly omitted the grant of discretion to the Courts in the area of the amount of the penalty to be assessed. Congress never intended the Courts to apply equitable considerations in mitigation of the statutory penalty in a case such as this. Respondent's conduct in refusing to pay Petitioner his earned wages was found to be without sufficient cause from the date of Petitioner's discharge from LAY BARGE 27, April 1, 1976 until May 6, 1980,[32] and as such Petitioner is entitled to collect the full amount of wages due him according to the plain language of the statute. To do otherwise will work an injustice and deny to Petitioner the full remedy afforded him by the statute. This is not a case where there was a lack of good faith on the part of Petitioner or where there was a good faith dispute by Respondent over a question of law or fact. No such findings were made by

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30. *Griffin v. Oceanic Contractors, Inc.*, C.A. No. S-78-26 Conclusion of Law No. 11 (E.D. Tex. May 6, 1980).

31. *Larkins v. Hudson Waterways Corp.*, 640 F.2d 997 (9th Cir. 1981); *Thomas v. S.S. Santa Mercedes*, 572 F.2d 1331 (9th Cir. 1978); *Escobar v. S.S. Washington Trader*, 503 F.2d 271 (9th Cir. 1974), vacated and remanded on other grounds sub nom. *American Trading Transp. Co. v. Escobar*, 423 U.S. 1070 (1976); *Swain v. Isthmian Lines, Inc.*, 360 F.2d 81 (3rd Cir. 1966).

32. Supra, N. 30.

the trial court or sought by the Respondent. On the contrary, specific findings of lack of due diligence by Respondent in conducting a reasonable investigation[33] and a complete lack of sufficient cause in failing to pay Petitioner's earned wages were made by the trial court.[34] Notwithstanding these findings, the trial court limited the running of the penalty period to 34 days, April 2, 1976 to May 5, 1976, with the penalty ending the day Petitioner gained reemployment after he was pronounced fit for duty.[35] The attainment of maximum medical cure and reemployment does not provide sufficient cause for the failure to timely pay earned wages.

Under the statutory plan enacted by Congress, there is ample room for equitable considerations in determining whether or not sufficient cause exists to delay the seaman's wages. A finding of sufficient cause for failure to pay totally relieves the shipowner from liability. A finding of lack of sufficient cause likewise triggers the penalty, assuming of course, the other statutory requirements have been met. Once a court makes the determination that sufficient cause is lacking, the enforcement of the penalty provision must be read as a mandatory command to the judiciary. Any other interpretation misplaces equitable considerations in the statutory plan and totally departs from the course of Congressional policy behind the statute. Nothing in the language of the statute or its history provides support for the exercise of judicial discretion in fixing the amount of the penalty.

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33. *Griffin v. Oceanic Contractors, Inc.*, C.A. No. S-78-21 Conclusion of Law No. 14, Finding of Fact No. 21 (E.D. Tex 1980).

34. Id., Conclusion of Law No. 11.

35. Id.

This exact issue was faced and resolved by the Third Circuit Court of Appeals in *Swain v. Isthmian Lines, Inc.*:

> [S]uch factors are those which were meant to be considered by a court in determining only whether there was an absence of sufficient cause for the wage deduction. If these equitable considerations carry the day on that issue, no penalty will be assessed at all. When Congress chose not to legislate a penalty for all cases in which the deduction was legally wrongful, as falling outside the categories in 46 U.S.C. § 701, it meant to have the equitable considerations—those separate and apart from the legal impropriety of the deduction—weighed in determining whether the section 596 penalty should be applied. Thus, when such considerations *fail* to establish the existence of sufficient cause for the deduction under section 596, those same equitable considerations may not be reevaluated when the assessment of the penalty is considered. Any other conclusion would certainly misplace such equitable considerations in the statutory scheme.
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> After all, if sufficient cause for the deduction is found to be lacking, the shipowner or his agent has either been overtly culpable in reducing a seaman's wages, or significantly inattentive in his duties vis-a-vis the seaman's wage rights. As we view it, it is precisely the possibility that large penalties will accrue that should motivate a shipowner to exercise care in computing wages due a seaman. We think that this deterrent was what Congress had in mind in providing for a penalty in the form of inflexible liquidated damages.
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> In conclusion, as was aptly stated in the dissenting court of appeals opinion in *Pacific Mail*, upon considering the penalty provision of section 596. '[A]s to the severity of the penalty, there is, of course, no

> thought of suggesting that a court can properly decline to enforce a statute merely because it may seem to be unnecessarily harsh.' Section 596 must be read as a mandatory command to the judiciary.[36]

There are simply no equities existing in favor of the Respondent who abandoned Petitioner in a foreign port in violation of 46 U.S.C. § 596. Every requirement contained in the plain language of 46 U.S.C. § 596 was met by the failure of Respondent to pay Petitioner the wages earned and due him through April 1, 1976, the date of his discharge from LAY BARGE 27. This statute was designed to protect Petitioner from exactly such an incident. This Court should award Petitioner two days pay for each day from April 2, 1976 until May 6, 1980 under 46 U.S.C. § 596.

Two lines of authority have developed regarding the applicable period for which the statutory penalty is to be assessed.[37] The Third and Ninth Circuits[38] have held that once the requirements of the statute are met, double wages must be awarded from the date the seamen's wages are originally due until the time payment is made, whether voluntarily or in satisfaction of final judgment. These Courts interpret the statutory language to be unequivocal and mandatory. A second line of cases,[39] which Respond-

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36. 360 F.2d 81, 87 (3rd Cir. 1966).

37. In *American Foreign S.S. Co. v. Matise*, 423 U.S. 150, 151-152 (1975), reh. denied 424 U.S. 979 (1976) this conflict was squarely before this Honorable Court but was not addressed since 46 U.S.C. § 596 was held inapplicable to the facts of that case.

38. Supra, at N. 31.

39. *Caribbean Federation Lines v. Dahl*, 315 F.2d 370 (5th Cir.), cert. denied 375 U.S. 831 (1963); *Southern Cross S. S. Co. v. Firipis*, 285 F.2d 651 (4th Cir. 1960), cert. denied 365 U.S. 869 (1961);

ent espouses and which the trial court relied upon in the instant case, hold that the time for which the penalty provision runs shall rest within the sound discretion of the trial court, depending upon and to be determined by the equities of each individual case. It is interesting to note that even under the discretionary standard, once the penalty provision is triggered, the double wages are awarded until such time as the seaman, with the exercise of due diligence, could have brought his action on to be heard in court.[40] Even if the discretionary standard were to be sanctioned by this Court, the trial court in the instant case misapplied that standard.

Federal courts adopting the discretionary rule have based their authority to introduce equitable considerations to tailor the amount of the penalty on this Court's holding in *Pacific Mail S.S. Co. v. Schmidt.*[41] In *Pacific Mail,* the seaman at the end of a foreign voyage received full payment of wages earned on the voyage on September 24, 1913, the last day of the voyage. Seaman Schmidt stayed on the vessel while it was in port and worked until he was discharged on October 1, 1913. Schmidt demanded his

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Prindes v. S. S. AFRICAN PILGRIM, 266 F.2d (4th Cir. 1959); *Forster v. Oro Navigation Co.,* 228 F.2d 319 (2d Cir. 1955), aff'g 128 F.Supp. 113 (S.D. N.Y. 1954); *Mavromatis v. United Greek Shipowners Corporation,* 179 F.2d 310 (1st Cir. 1950); *Mystic S.S. Co. v. Stromland,* 20 F.2d 342 (4th Cir. 1927).

40. *Caribbean Federation Lines v. Dahl,* 315 F.2d 370 (5th Cir.), cert. denied 375 U.S. 831 (1963).

41. 241 U.S. 245 (1916). The cases of *Southern Cross Steamship Co. v. Firipis,* 285 F.2d 651 (4 Cir. 1960), cert. denied 365 U.S. 869 (1961); *Mavromitis v. United Greek Shipowners Corporation,* 179 F.2d 310 (1st Cir. 1950); and *Mystic S.S. Co. v. Stromland,* 20 F.2d 342 (4th Cir. 1927) have all based their holdings on *Pacific Mail.* Many other cases have relied on these appellate decisions and have thereby formed a line of precedent supporting the discretionary rule upon which Respondent stands.

wages from September 24th until October 1st but was denied payment by the shipowner due to a deduction for missing silverware. This withholding was found by the trial court to be without sufficient cause. The district court awarded penalty wages to the date of decree, November 5, 1913. The Court of Appeals awarded penalties during the pendency of the appeal, and added these to the penalty assessed by the district court.

The sole issue in *Pacific Mail* was whether penalties should be allowed after the district court's judgment. This Honorable Court held that the time period for awarding penalties terminated on the date of the district court's decree. The seaman in *Pacific Mail* was awarded penalty wages for each and every day payment of his earned wages was delayed without sufficient cause up until the district court judgment, exactly what Petitioner is contending should be awarded him.

The decision in *Pacific Mail* must be limited to the narrow question presented there for review. The Supreme Court did not, in that case, allow the penalties to run after the district court decree because the shipowner's appeal was based upon a reasonable good faith belief that the statute did not apply to wages earned after the voyage terminated. The shipowner's liability under the statute had been disputed from the beginning. The express holding of the Supreme Court was that there was sufficient cause for the neglect to pay after the district court decree.

Pacific Mail should be considered *sui generis*. It should not be construed to stand for the broad proposition that the judiciary has the authority to disregard the clear command of 46 U.S.C. § 596 by tailoring the length of the

penalty time to the equities of a particular case. *Pacific Mail* more logically supports a mandatory standard by its holding that penalty wages were proper up until the district court's decree. As pointed out in *Swain*:

> [I]ndeed, the converse of a right to exercise discretion in the name of equitable considerations may be gleaned from *Pacific Mail*, for despite the fact that the question of the applicability of the penalty provision was such a close one, the Supreme Court did not see fit to remand the cause to the District Court for consideration of this factor for the purpose of mitigating the penalties which had accrued prior to the entry of the District Court's decree.[42]

Furthermore, the decision in *Pacific Mail* can be limited by the general rule of merger.[43] A valid and final judgment merges the original cause of action into the judgment, extinguishing the original cause of action and substituting for it a new claim on the judgment obtained.[44] The holding in *Pacific Mail* could not have resisted the general rule of merger had the issue been considered, in light of the common law rule that the cause of action created by 46 U.S.C. § 596, including the penalty, is extinguished by and merges into the district court's decree. In *Atty. Gen. v. Western U. Teleg. Co.*,[45] this Honorable Court held under a similar penalty statute that the penalty terminated with the district court's decree on the basis of

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42. 360 F.2d 81, 86 (3rd Cir. 1966).

43. The decision in *Pacific Mail* did not reach the issue of merger. 241 U.S. 245, 251.

44. *Atty. Gen. v. Western U. Teleg. Co.*, 141 U.S. 40 (1891); *United States v. Price*, 50 U.S. 83 (1843); *Kaspar Wire Works, Inc. v. Leco Engineering and Machine, Inc.*, 575 F.2d 530 (5th Cir., 1978); *Krone v. Lacy*, 305 F.2d 245 (8th Cir. 1962).

45. 141 U.S. 40 (1891).

merger. An express application of the rule of merger to 46 U.S.C. § 596 by this Honorable Court would stabilize the penalty time period and limit the potential liability of a shipowner by establishing a definite point for the termination of the penalty period.

Respondents contention that *Pacific Mail* approves of the discretionary standard is further contradicted by *McCrea v. United States,*[46] a later decision of this Honorable Court:

> [T]he liability is conditioned by the statute upon the refusal or neglect to pay wages 'in the manner hereinbefore mentioned without sufficient cause'. The quoted phrase refers to the specified periods within which the seaman's wages are directed to be paid, and the section thus imposes the liability for neglect, without sufficient cause, to pay the wages within the prescribed period. Petitioner seeks, by a more liberal interpretation of the words, to impose the liability for such delay in payment, without sufficient cause, as may occur at any time after an excusable failure to pay within the prescribed period. This possibility is precluded by the further provision of the section that double wages shall be paid for each day 'during which payment is delayed beyond the respective periods' within which payment is to be made. *Thus, liability for double wages accrues, if at all, from the end of the period within which payment should have been made.* (emphasis added) It must be determined by the happening of an event within the period, failure to pay wages without sufficient cause. The statute affords a definite and reasonable procedure by which the seaman may establish his right to recover double pay where his wages are unreasonably withheld.[47]

46. 294 U.S. 23 (1934).

47. Id. at 31-32.

Pacific Mail is not a foundation which can support Respondent's position, nor upon which the subsequent cases relying upon it can be legally supported. *Pacific Mail* has been misinterpreted and therefore the cases supporting the discretionary rule should not be followed.

Petitioner submits that a careful examination of *Pacific Mail* and *McCrea* supports the mandatory standard in applying the penalty provision and that such standard is the proper one for this Court to apply in this case.

III.

ANY APPARENT HARSHNESS OR SEVERITY TO THE SHIPOWNER RESULTING FROM THE LITERAL APPLICATION OF 46 U.S.C. § 596 IS PURELY ILLUSORY SINCE THE PENALTY MAY BE TOLLED AT ANY TIME BY A TENDER OF THE DISPUTED WAGE CLAIM INTO THE REGISTRY OF THE COURT.

Regardless of the apparent severity of a penalty resulting from the application of 46 U.S.C. § 596, the statute must be enforced as written by Congress. Since Congress has decided that a penalty is proper under the statute, this Honorable Court should enforce it to effectuate its protective and punitive purpose.

However, even in a situation where the penalty wages have come into play, a shipowner such as Respondent is not without a mitigating remedy. The shipowner can avoid any harshness in the enforcement of 46 U.S.C. § 596 simply by complying with the rule of tender as set forth in *Southern Cross Steamship Company v. Firipis.*[48]

48. 285 F.2d 651 (4th Cir. 1960), cert. denied 365 U.S. 869 (1961).

"It would seem to be no abuse of discretion to require such payment into court, thereby protecting the shipowner against increased liability and insuring payment to the seaman."[49] The rule of tender allows the shipowner to pay into the registry of the court the originally unpaid earned wages of the seaman. This constructive payment of wages terminates the running of the penalty time period until the controversy is decided by the court. The rule benefits and protects the shipowner and at the same time guarantees payment to the seaman. As stated in *Swain*,[50] the rule of tender is "the most adequate protection a shipowner has against accumulating penalties once a libel is filed. . . ."[51] This remedy which is available to all shipowners after a court action has been instituted effectively nullifies any harshness or severity in the penalty awarded under a mandatory application of the statute.

In addition, an unconditional tender of wages to the seaman will end the running of the double wages, as of the date of tender. The tender does not relieve the shipowner from liability for the prior waiting time but does limit liability up to the date of tender.[52]

CONCLUSION

The legislative history of 46 U.S.C. § 596 clearly demonstrates that Congress intended an inflexible standard in awarding penalties under the statute, once the

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49. Id. at 660.

50. *Swain v. Isthmain Lines, Inc.*, 360 F.2d 81 (3rd Cir. 1966).

51. Id. at 88, N. 26.

52. *Bassis v. Universal Lines, S.A.*, 436 F.2d 64 (2d Cir. 1970); *The Fletero v. Arias*, 206 F.2d 267 (4th Cir.), cert. denied 346 U.S. 897 (1953).

penalty is properly invoked. The statute by its terms applies only to inequitable and arbitrary conduct on the part of a shipowner. It is designed to protect seamen from abusive conduct. The discretionary rule which has been superimposed on the statute totally disregards Congress' intent and, in effect, rewrites the statute so as to substitute judicial judgment for that of the legislature. Such an application not only violates all traditional principles of equity but also undermines the remedial and punitive nature of the statute and the protection of American seamen as the wards of admiralty.

This Honorable Court's decision in this case has an international scope effecting the rights and remedies of discharged seamen, both American and foreign, relating to the recovery of earned wages wrongfully withheld. Petitioner respectfully urges this Honorable Court to interpret 46 U.S.C. § 596 as calling for an award of double wages for each and every day of delay according to the plain language of the statute.

Respectfully submitted,

FRIEDMAN AND CHAFFIN

ROBERT A. CHAFFIN

CERTIFICATE OF SERVICE

I hereby certify that I mailed this day three (3) true and correct copies of the foregoing Brief for Petitioner to each of the following attorneys, being the only other attorneys of record:

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on this _____ day of January, 1982.

ROBERT A. CHAFFIN

Appendix

APPENDIX A

Act of July 20, 1790, Chapter 29, §6, 1 Stat. 133

Sec. 6. *And be it enacted,* That every seaman or mariner shall be entitled to demand and receive from the master or commander of the ship or vessel to which they belong, one-third part of the wages which shall be due to him at every port where such ship or vessel shall unlade and deliver her cargo, before the voyage be ended, unless the contrary be expressly stipulated in the contract; and as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract; and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners, touching said wages, it shall be lawful for the judge of the district where the said ship or vessel shall be, or in case his residence be more than three miles from the place, or of his absence from the place of his residence, then, for any judge or justice of the peace to summon the master of such ship or vessel to appear before him, to show cause why process should not issue against such ship or vessel, her tackles, furniture, and apparel, according to the course of admiralty courts, to answer for the said wages: and if the master shall neglect to appear, or appearing, shall not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute shall not be forthwith settled, in such case the judge or justice shall certify to the clerk of the court of the district, that there is sufficient cause of complaint

whereon to found admiralty process, and thereupon the clerk of such court shall issue process against the said ship or vessel, and the suit shall be proceeded on in the said court, and final judgment be given according to the course of admiralty courts in such cases used; and in such suit all the seamen or mariners (having cause of complaint of the like kind against the same ship or vessel) shall be joined as complainants; and it shall be incumbent on the master or commander to produce the contract and log-book, if required, to ascertain any matters in dispute, otherwise the complainants shall be permitted to state the contents thereof, and the proof of the contrary shall lie on the master or commander; but nothing herein contained shall prevent any seaman or mariner from having or maintaining any action at common law for the recovery of his wages, or from immediate process out of any court having admiralty jurisdiction, wherever any ship may be found, in case she shall have left the port of delivery where her voyage ended, before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo on ballast.

APPENDIX B

Act of June 7, 1872, Chapter 322, §35, 17 Stat. 269

Sec. 35. That the master or owner of any ship making voyages as hereinbefore described in section twelve of this act, except foreign-going ships, shall pay to every seaman his wages within two days after the termination of the agreement, or at the time such seaman is discharged, whichever first happens; and in the case of foreign-going ships, within three days after the cargo has been delivered, or within five days after the seaman's discharge, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid, on account, a sum equal to one fourth part of the balance due to him; and every master or owner who neglects or refuses to make payment in manner aforesaid without sufficient cause shall pay to the seaman a sum not exceeding the amount of two day's pay for each of the days, not exceeding ten days, during which payment is delayed beyond the respective periods aforesaid; and such sum shall be recoverable as wages in any claim made before the court: *Provided,* That this section shall not apply to the masters or owners of any vesssel where the seaman is entitled to share in the profits of the cruise or voyage.

APPENDIX C

Section 4529 (1878)
Revised Statutes of the United States

Sec. 4529. The master or owner of every vessel making voyages from a port on the Atlantic to a port on the Pacific, or vice versa, shall pay to every seaman his wages, within two days after the termination of the agreement, or at the time such seaman is discharged, whichever first happens; and, in the case of vessels making foreign voyages, within three days after the cargo has been delivered, or within five days after the seaman's discharge, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid, on account, a sum equal to one-fourth part of the balance due to him. Every master and owner who neglects or refuses to make payment in manner hereinbefore mentioned, without sufficient cause, shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed beyond the respective periods; which sum shall be recoverable as wages in any claim made before the court. But this section shall not apply to the masters or owners of any vessel the seamen on which are entitled to share in the profits of the cruise or voyage.

APPENDIX D

Act of December 21, 1898, Chapter 28, §4, 26, 30 Stat. 756

Chap. 28—An Act To amend the laws relating to American seamen, for the protection of such seamen, and to promote commerce.

Sec. 4. That section forty-five hundred and twenty-nine of the Revised Statutes be, and is hereby, amended so as to read as follows:

Sec. 4529. The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he shipped, or at the time such seaman is discharged, whichever first happens; and in the case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid, on account of wages, a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to the masters or owners of any vessel the seamen on which are entitled to share in the profits of the cruise or voyage.

Respondent's Brief

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NO. 81-614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DANNY L. GRIFFIN,
Petitioner

v.

OCEANIC CONTRACTORS, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether or not, under the facts and circumstances of the case, a district court is empowered to exercise its discretion in determining the duration of the period to which the wage penalty applies under 46 U.S.C. § 596.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE DISTRICT COURT AND THE COURT OF APPEALS

Petitioner, Danny L. Griffin

Respondent, Oceanic Contractors, Inc.
(now McDermott International, Inc.)

Respondent's Parent Corporation,
McDermott, Inc.

Respondent's Subsidiaries and Affiliates,

Badya Builders, Inc.
Creole Insurance Company, Ltd.
Honore Insurance Company, Ltd.
Jaramac Associated Services, Ltd.
J. Ray McDermott (Aust.) Pty, Ltd.
J. Ray McDermott (U.K.), Inc.
J. Ray McDermott London, Ltd.
Malmac Sdn. Bhd.
McDermott Far East, Inc.
McDermott (Malaysia) Sdn. Bhd.
McDermott Servicos de Construcao, Ltda.
McDermott West Indies Company
Oceanic Red Sea Company
P.T. Batam Fabricators
P.T. McDermott Indonesia
Sharman, Allen, Gay & Taylor, S.A.
Chartering Company (Singapore), Pte. Limited

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NO. 81-614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DANNY L. GRIFFIN,
Petitioner

v.

OCEANIC CONTRACTORS, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

To The Honorable Chief Justice And The Associate Justices Of The Supreme Court:

Respondent, Oceanic Contractors, Inc., respectfully submits this its Brief on Writ of Certiorari and respectfully prays that this Honorable Court affirm the decisions of the courts below.

OPINIONS BELOW

The Opinion of the District Court, styled Danny L. Griffin v. Oceanic Contractors, Inc., Civil Action No. S-78-26, United States District Court, Eastern District of Texas, Sherman Division, is unpublished.

The Opinion of the Court of Appeals for the Fifth Circuit appears at 664 F.2d 36 (1981).

JURISDICTION

Respondent is in agreement with the Petitioner's statement of the grounds of this Court's jurisdiction.

STATUTE INVOLVED

46 U.S.C. § 596

The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which

sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seaman of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts. R.S. § 4529; Dec. 21, 1898, c. 28, §§ 4, 26, 30 Stat. 756, 764; Mar. 4, 1915, c. 153, § 3, 38 Stat. 1164.

STATEMENT OF THE CASE

Petitioner, Danny L. Griffin, a resident of Houston, Texas, on February 18, 1976, executed an employment contract with Respondent, Oceanic Contractors, Inc., North Sea Division, whereby he agreed to work for Respondent in the North Sea as a welder. The contract provided that Petitioner's employment was to commence upon his departure from the United States and continue "until December 15, 1976, or until Oceanic's 1976 pipeline committal in the North Sea is fulfilled, whichever shall occur first unless [his] services [were] sooner terminated" (J.A. 41); that he would be paid a base rate of $6.65 an hour plus an expatriation premium of $415.00 per month for his work as a structural welder, and a base rate of $9.65 per hour plus an expatriation premium of $720.00 a month for his work as a pipeline welder; and that he would receive an annual bonus of ten percent of straight-time pay earned and a completion bonus of sixteen and two-thirds percent of straight-time pay earned, payable only upon his completion of the contractual employment term (J.A. 48, 49).

The contract further provided that if Petitioner's services should be terminated for cause, or if he should quit his job prior to the date of termination of the Em-

ployment Agreement, he would be charged with return transportation. The Respondent was given the option of withholding $137.50 from each of Petitioner's first four full pay periods as a cash deposit for the payment of his return transportation in the event he should become obligated for its payment.

Petitioner departed the United States on March 7, 1976, and flew to Antwerp, Belgium, where he reported for work on board Respondent's LAY BARGE 27, a special purpose vessel designed and outfitted for the assembly and installation of marine pipelines in the North Sea. LAY BARGE 27 was tied up in Antwerp Harbor for winter repairs. While working aboard the vessel in the harbor on April 1, 1976, making the vessel ready for the new pipe laying season, Petitioner experienced a flare-up of a pre-existing hemorrhoid condition when he attempted to move an empty oxygen bottle by himself (Tr. 232-233).*

Petitioner left the vessel on the same day and obtained conservative medical treatment from a physician in Antwerp. He was admitted to a Hospital in Antwerp on April 2, and underwent a partial hemorrhoidectomy on April 3.

Following his discharge from the hospital on April 5, 1976, Petitioner returned to the harbor and attempted to board LAY BARGE 27, although he had been pronounced not fit for duty by the treating physician (Tr. 197-8, 234-236; Pl. Ex. 14). Respondent's welding superintendent, Jesse Williams, refused to allow Petitioner to

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* Transcript of the trial proceedings and testimony contained in two (2) volumes marked IV (Vol. I) and IV (Vol. II).

resume his duties on the vessel in that physical condition (Tr. 199, 236, 307).

While in the hospital in Antwerp, Petitioner purchased an airplane ticket to Houston. Upon his arrival in the United States, he received medical attention from a physician in Houston, who pronounced him fit for duty on May 3, 1976, as he had reached maximum medical recovery as of that date (Tr. 203-5, 419-20, 444).

The evidence showed that Petitioner, on May 5, 1976, informed Charles Layrisson, Respondent's Personnel Administrator, that he had not yet been medically released, but that he would advise Respondent when he was ready to return to work (Tr. 363). Layrisson reported that conversation by telex to Respondent's office in Brussels (Tr. 363-364; Def. Ex. 14; J.A. 60). Having heard nothing further from Petitioner, Layrisson sent him a telegram on May 21, 1976, requesting that Petitioner contact him immediately (Tr. 364-365; Def. Ex. 13; J.A. 61). Petitioner did not reply to that telegram and Respondent concluded that Petitioner did not intend to return to work on LAY BARGE 27. Respondent's Brussels office terminated Petitioner's employment on June 1, 1976 (J.A. 62, Def. Ex. 12). Petitioner's father, who was listed in the contract as the person to be notified in case of emergency (J.A. 41) was advised on June 2, 1976, that Petitioner's contract had been terminated (J.A. 63). His termination, although done on June 1, was made retroactive to April 1, his last day of employment on LAY BARGE 27.

Petitioner at no time reported to any representative of Respondent that the treating physician had pronounced him fit for duty, and that he was ready and able to return to his employment with Respondent (Tr. 256). He did

not contact any representative of Respondent about returning to work (Tr. 245, 247-250).

Petitioner accepted a job with Viking Offshore Services as an offshore welder aboard the VIKING PIPER, which was then working in the North Sea. He commenced his work with Viking on May 5, 1976, two days after he was declared fit for duty. (Tr. 206, 274; J.A. 21, F.O.F. No. 24).

Petitioner, a resident of Houston, Texas, brought suit on February 3, 1978, in the United States District Court for the Eastern District of Texas, Sherman Division, against Respondent under the Jones Act, general maritime law, and 46 U.S.C. § 596, seeking recovery of maintenance and cure, reparation expenses, earned and unearned wages and penalties (R. 2). The trial judge found that LAY BARGE 27 was unseaworthy due to an insufficient number of crew members, and that Petitioner's injury resulted from this unseaworthy condition (lack of assistance in moving an oxygen bottle). He awarded damages totalling $23,670.40 to Petitioner as follows: (1) the sum of $5,913.68 as recovery for maintenance and cure, earned and unearned wages, reparation expenses, and the value of lost personal effects; (2) $2,506.89 as prejudgment interest on the recovery of such damages; (3) $3,368.23 as attorney's fees for such recovery; (4) $5,000.00 for pain and suffering; and (5) $6,881.60 as penalty wages under Section 596, Title 46, United States Code.

The district court found that Respondent had retained the total sum of $412.50 from Petitioner's first three paychecks pursuant to the employment agreement provision calling for withholding of $137.50 from each of his first

four paychecks to provide for return transportation, that such funds were not paid to Petitioner upon his leaving the employ of Respondent, and that such failure to pay was without sufficient cause. It was in respect of this $412.50 that the Court awarded the $6,681.60 statutory penalty pursuant to 46 U.S.C. § 596. The district court determined that the appropriate period for assessment of the double wage penalty was from April 1, 1976, the date that Petitioner left LAY BARGE 27 (he was actually paid his wages through April 7, the date he arrived in Houston) through May 5, 1976, the date Petitioner became re-employed after being pronounced fit-for-duty.

Respondent paid the judgment on September 17, 1980. The Satisfaction of Judgment appears on page 30 of the Joint Appendix.

Petitioner appealed the district court's judgment to the United States Court of Appeals for the Fifth Circuit, asserting several grounds of error in the damage award. The court of appeals affirmed the decision, holding that the district court neither abused its discretion nor committed any error of law in the computation of the damage award. (J.A. 32; 664 F.2d 36 [5th Cir. 1981]).

The sole issue presented by Petitioner to this Court involves the amount of the statutory penalty awarded by the district court pursuant to 46 U.S.C. § 596.

SUMMARY OF THE ARGUMENT

Although the legislative intent of 46 U.S.C. § 596 is to secure for seamen the prompt payment of their wages and thus to protect them from the harsh consequences of arbitrary and unscrupulous actions of their employers, Section 596 should be interpreted in light of its legisla-

tive purpose so as to effectuate the intent of Congress and so as to avoid absurd or unjust consequences which might result from a literal reading of the statute.

Courts should exercise their discretion in determining the period to which the statutory penalty provided by 46 U.S.C. § 596 is to be applied so that the remedial purpose of the statute is effectuated to afford reasonable and just remedies to seamen. While the effect of the remedy provided to seamen by § 596 may be in the nature of a penalty to the employer, the legislative purpose of the statute is clearly remedial, not penal in nature.

Payment by the employer of the disputed wage claim into the registry of the court to terminate continued accrual of penalty liability under § 596 is of no consequence to the appropriate role of the court in exercising discretion in determining the duration of the penalty period based on the equities of the particular case.

ARGUMENT

I.

THE LEGISLATIVE INTENT OF 46 U.S.C. § 596 IS TO SECURE FOR SEAMEN THE PROMPT PAYMENT OF THEIR WAGES AND THUS TO PROTECT THEM FROM THE HARSH CONSEQUENCES OF ARBITRARY AND UNSCRUPULOUS ACTIONS OF THEIR EMPLOYERS.

This Honorable Court, as Petitioner has pointed out in his brief, has expressed its view of the legislative intent underlying 46 U.S.C. § 596. Mr. Justice Stone wrote in *Collie v. Ferguson*:[1]

1. 281 U.S. 52 (1930).

> [T]he evident purpose of the Section [is] to secure prompt payment of seamen's wages (H.R.Rep. 1657, Committee on the Merchant Marine and Fisheries, 55th Cong., 2d Sess.), and thus to protect them from the harsh consequences of arbitrary and unscrupulous action[s] of their employers, to which, as a class, they are peculiarly exposed.[2]

This is consistent with this Court's general view of the Congressional legislation in aid of seamen which it has been called upon to review since 1872, that is, that such legislation is largely remedial and calls for liberal interpretation in favor of the seamen.[3] In *Garrett v. Moore-McCormack Company*,[4] a case involving the burden of proof required to invalid a seaman's release, this Court stated:

> Our historic national policy, both legislative and judicial, points the other way [from burdening seamen]. Congress has generally sought to safeguard seamen's rights.[5]

This policy was the consequence of the then prevalent perception of the seamen themselves. This view was stated by Mr. Justice Cardozo in *Warner v. Goltra*,[6] a case in which this Court was called upon to determine whether the master of a tug was a "seaman" within the meaning of the Jones Act, as follows:

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2. *Id.* at 55. *Accord McCrea v. U.S.*, 294 U.S. 23 (1935).

3. *Isbrandtsen Co., Inc. v. Johnson*, 343 U.S. 779, 782 (1952).

4. 317 U.S. 239 (1942).

5. *Id.* at 246. *See also Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943).

6. 293 U.S. 155 (1934).

> [T]he maritime law by inveterate tradition has made the ordinary seamen a member of a favored class. He is a "ward of the admiralty," often ignorant and helpless, and so in need of protection against himself as well as others.[7]

The appropriate role of courts in applying such statutes was discussed by this Court in *Isbrandtsen Co. Inc. v. Johnson*:[8]

> Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident. No rule of construction precludes giving a natural meaning to legislation like this that obviously is of a remedial, beneficial and amendatory character. It should be interpreted so as to effect its purpose. Marine legislation, at least since the Shipping Commissioners Act of June 7, 1872, 17 Stat. 262, should be construed to make effective its design to change the general maritime law so as to improve the lot of seamen.[9]

The legislative history of 46 U.S.C. § 596 as reflected in reports of Senate debate confirm the remedial intent underlying the statute. As Senator Vardaman stated, the purpose of § 596 was "to protect from the exactions of conscienceless greed the men who do the work, who operate the ships, and give them larger liberty and make

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7. *Id.* at 162. *See also Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 377 (1932); *Wilder v. Inter-Island Stream Navigation Co.*, 211 U.S. 239, 246-47 (1908); *Patterson v. Bark EUDORA*, 190 U.S. 169, 174-75 (1903); *Robertson v. Baldwin*, 165 U.S. 275, 287 (1897).

8. 343 U.S. 779 (1952).

9. *Id.* at 783.

the vocation more attractive to self-respecting men."[10] There is nothing in the legislative history to suggest the existence of a penal intent to the statute.

Recently, in *American Foreign S.S. Co. v. Matise*[11] this Court, in an opinion by Mr. Justice Marshall, reaffirmed its view of the legislative intent underlying 46 U.S.C. § 596 as that which was expressed by Mr. Justice Stone in *Collie v. Ferguson.*

The lower courts have, for the most part, correctly recognized the remedial character of the legislative intent underlying § 596, attributing the legislation to such motivations as the general improvement of the surroundings and conditions of American seamen[12] or the prevention of the turning ashore of seamen with little or no money in their pockets.[13] Some lower courts have, however, blurred the distinction between legislative intent, solely remedial in light of the legislative history and the prior decisions of this Court, with the effect such a remedy has on the party from whom the seamen are to be protected, the employers, that effect being admittedly in the nature of a penalty. These courts have incorrectly described 46 U.S.C. § 596 as being penal in nature and intent.[14]

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10. 52 CONG. REC. 4808 (1915).

11. 423 U.S. 150 (1975), *reh. denied,* 424 U.S. 979.

12. *Ladzinski v. Sperling Steamship and Trading Corp.,* 300 F.Supp. 947, 954 (S.D.N.Y. 1969).

13. *Malanos v. Chandris,* 181 F.Supp. 189, 191 (N.D.N.Y. 1959). *See also Underwood v. Isbrandtsen Co., Inc.,* 100 F.Supp. 863, 865 (S.D.N.Y. 1951).

14. *Chambers v. Moore-McCormack Lines, Inc.,* 84 F.Supp. 1009, 1011 (E.D. Pa. 1949), *aff'd* 182 F.2d 747 (3d Cir. 1950); *Butler v. U.S. War Shipping Admin.,* 68 F.Supp. 441, 445 (E.D. Pa. 1946); *Petterson v. U.S.,* 274 F. 1000, 1001 (S.D.N.Y. 1921).

Regardless of the characterization of 46 U.S.C. § 596 as remedial, or its mischaracterization as penal, the provision must be construed so as to effectuate the legislative intent of ameliorating the specific injustices that the Congress sought to eliminate.[15] Respondent would respectfully submit that the legislative intent of § 596 is, as this Court has stated, the protection of seamen. There is nothing in the legislative history of § 596 or its predecessors or in the prior decisions of this Court to support the proposition advanced by Petitioner herein that § 596 is penal in its intent. The statute must, therefore, be interpreted so as to effectuate the protection of seamen.

II.

COURTS SHOULD INTERPRET 46 U.S.C. § 596 IN LIGHT OF ITS LEGISLATIVE PURPOSE SO AS TO EFFECTUATE THE INTENT OF CONGRESS AND SO AS TO AVOID ABSURD OR UNJUST CONSEQUENCES WHICH MIGHT RESULT FROM A LITERAL READING OF THE STATUTE.

Perhaps the most fundamental and significant rule of law applicable in instances in which a court is called upon to apply a statutory provision to a given set of facts is that the statute is to be applied and interpreted in such a way so as to effectuate the legislative intent underlying the particular statute.[16] Mr. Justice Rehnquist, speaking for this court, stated recently in *Philbrook v. Glodgett*:[17]

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15. *Ladzinski v. Sperling Steamship and Trading Corp.*, 300 F. Supp. at 955.

16. *See generally* Cardozo, THE NATURE OF THE JUDICIAL PROCESS (1921); Cox, *Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947).

17. 421 U.S. 707 (1975).

> "In expounding a statute, we must not be guided by a single sentence or member of a sentence but look to the provisions of the whole law, and to its object and policy." *United States v. Heirs of Boisdore,* 8 How. 113, 122, 49 U.S. 113 (1949); *Richards v. United States,* 369 U.S. 1, 11 (1962); *Chemehuevi Tribe of Indians v. F. P. C.,* 420 U.S. 395, 402-03 (1975). Our objective in a case such as this is to ascertain the Congressional intent and give effect to the legislative will. The language of [the statute under consideration] certainly leans toward the construction adopted by the District Court, but "[i]t is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." *Church of the Holy Trinity v. United States,* 143 U.S. 457, 459 (1892).[18]

A court called upon to interpret a statute must ascertain the intent of Congress, the primary rule of statutory construction being to ascertain and to give effect to the plain meaning of the language used.[19] The starting point in a search for legislative intent is of course the pertinent statutory language.[20] Often the plain meaning of the language used in the statute will evidence the legislative intent,[21] but where it does not, other indicia may and

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18. 421 U.S. at 713-14. *See also Muniz v. Hoffman,* 422 U.S. 454, 469 (1975); *National Woodwork Mfrs. Ass'n v. NLRB,* 386 U.S. 612, 619 (1967).

19. *Hughes Air Corp. v. Public Utilities Commn.,* 644 F.2d 1334, 1337 (9th Cir. 1981), *citing Philbrook v. Glodgett,* 421 U.S. 707 (1975).

20. *Dupuy v. Dupuy,* 511 F.2d 641, 642 (5th Cir. 1975).

21. *Caminetti v. U.S.,* 242 U.S. 470, 485 (1917). *See also Flora v. U.S.,* 357 U.S. 63, 65 (1958); *U.S. v. Second Natl. Bank,* 502 F.2d 535, 539-40 (5th Cir. 1974), *cert. denied* 421 U.S. 912 (1975).

should be consulted so as to discern the legislative intent.[22] The objective is to obtain an interpretation of the statute which is in harmony with its dominant purpose.[23]

Deference to the plain meaning rule should not be unthinking or blind. Courts should go beyond the plain meaning of statutory language when adherence to it would produce an absurd result or an unjust result.[24] As Mr. Justice Brennan wrote in *In re Trans Alaska Pipeline Rate Cases*:[25]

> This Court, in interpreting the words of a statute, has "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute'. . . ." *Commissioner v. Brown*, 380 U.S. 563, 571 (1965) (citations omitted).[26]

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22. *Driver v. Helms*, 577 F.2d 147, 149-50 (1st Cir. 1978), *cert. denied* 439 U.S. 1114 (1979); *Massachusetts Financial Services, Inc. v. Securities Investor Protection Corp.*, 545 F.2d 754, 756 (1st Cir. 1976), *cert. denied* 431 U.S. 904 (1977).

23. *Kokoszka v. Belford*, 417 U.S. 642, 650-51 (1974); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968); *Spilker v. Shayne Laboratories, Inc.*, 520 F.2d 523, 525 (9th Cir. 1975).

24. *U.S. v. American Trucking Ass'ns., Inc.*, 310 U.S. 534, 543 (1940); *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940); *U.S. v. Tex.-Tow, Inc.*, 589 F.2d 1310, 1313 (7th Cir. 1978); *Consumers Union of U.S., Inc. v. Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978); *Massachusetts Financial Services, Inc. v. Securities Investor Protection Corporation*, 545 F.2d 754, 756 (1st Cir. 1976), *cert. denied* 431 U.S. 904 (1977); *Quinn v. Butz*, 510 F.2d 743, 753 (D.C. Cir. 1975); *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 945 (D.C. Cir. 1971).

25. 436 U.S. 631 (1978).

26. 436 U.S. at 643.

The Court of Appeals for the Ninth Circuit, discussing the plain meaning rule, stated in *International Tel. and Tel. Corp. v. General Tel. & Elec. Corp.*:[27]

> There are two circumstances in which [a] court may look beyond the express language of a statute in order to give force to Congressional intent: where the statutory language is ambiguous; and where a literal interpretation would thwart the purpose of the over-all statutory scheme or lead to an absurd result.[28]

Petitioner would urge this Court that a blind, slavish and mechanistic application of the statute, one which withdraws from the courts any right to exercise discretion in determining the length of the penalty period, is mandated by the statute.[28a] As noted by courts and commentators, such an approach to statutory interpretation is simply wrong. As the Court of Appeals for the Second Circuit stated in *New York State Commn. on Cable Television v. FCC*:[29]

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27. 518 F.2d 913 (9th Cir. 1975).

28. 518 F.2d at 917-18.

28a. If read literally, as Petitioner urges, § 596 is inapplicable under the circumstances of this case, because LAY BARGE 27 was not a "vessel[s] making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa", which would trigger the requirement for payment of wages within four days after the seaman has been discharged. LAY BARGE 27 was not on a voyage, but in port being overhauled and prepared for the forthcoming pipe laying season. The Court of Appeals for the Fourth Circuit held in *Eaton v. SS EXPORT CHALLENGER*, 376 F.2d 725 (1967) that the statutory penalty does not apply to wages for work performed on "port time".

29. 571 F.2d 95 (2d Cir. 1978), *cert. denied* 439 U.S. 820 (1979).

> Mere incantation of the plain meaning rule, without placing the language to be construed in its proper framework, cannot substitute for a meaningful analysis. For we must remember Judge Learned Hand's stricture that "[t]here is no surer way to misread any document than to read it literally. . . ." *Guiseppi v. Walling,* 144 F.2d 608, 624 (2d Cir. 1944) (concurring), *aff'd sub nom Gemsco, Inc. v. Walling,* 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921 (1945). And as Professor Cox wisely noted, "[N]o one has ever suggested that the courts must always follow the letter of a statute regardless of the outcome, nor does any one contend that the words may be entirely disregarded. The issue is where to strike the balance." Cox, *Judge Learned Hand and the Interpretation of Statutes,* 60 HARV. L. REV. 370, 376 (1947).[30]

The essence of what Professor Cox views as the courts' role in statutory interpretation is the exercise of discretion. Petitioner would foreclose the courts from such a role.

The statute under consideration is, as most statutes, a subject for judicial interpretation. Various courts have viewed the "without sufficient cause" requirement of 46 U.S.C. § 596 in different ways, applying the requirement to the determination of, at the initial stage, whether or not a withholding was or was not in violation of the statute's prohibition. Courts have, in addition, taken the "without sufficient cause" standard into account when determining the applicable penalty period if a prohibited withholding has been found, the cause or proffered excuse for the withholding being one of the equities taken into consideration in determining the applicable penalty period. If the plain language of the statute does not itself call for the exercise of discretion on the part of the courts

30. 571 F.2d at 98.

in determining the applicable penalty period, which Respondent would respectfully submit it does in fact do, an ambiguity, whether latent or patent, exists which must be resolved through judicial interpretation on the above discussed bases.

Respondent submits that the statutory construction demanded by Petitioner would, both in the instant case and in general, bring about consequences that are both absurd and unjust. In the instant case, Respondent, in accordance with the terms of the employment contract, withheld $412.50 to defray return transportation costs.[31] Petitioner would, if his view of the statute was determined to be accurate, receive twice his daily wage for the period of time the improperly withheld wage was earned until the penalty awarded by the district court below was paid into the registry of the court, through the Satisfaction of Judgment dated September 17, 1980, a period of 1599 days.[32] As Petitioner's daily wage for purposes of determining the penalty at the time he left the employ of Respondent was $101.20,[33] Petitioner would receive a total windfall in excess of $300,000.00 as a remedy for the improper withholding of $412.50. Congress intended seamen to have a remedy in the event their wages were wrongfully withheld. Congress did not intend that they obtain a windfall of immense proportions from the possible neglect or inattentiveness of their employer.

To carry out the statutory construction urged by Petitioner to what may well be both a literal and figurative

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31. Joint Appendix, p. 28 (Judgment of the District Court — Conclusion of Law No. 11).

32. Joint Appendix, p. 30 (Satisfaction of Judgment).

33. Joint Appendix, p. 28 (Judgment of the District Court — Conclusion of Law No. 11).

absurd, let us consider the case of a seaman employed under a written agreement earning $101.20 per day as was the Petitioner herein. Let us assume that the seaman's employer, through simple error, improperly withheld $1.00 from that seaman's pay. Let us assume that the seaman pursued recovery of that $1.00 through extrajudicial means for almost four years but without success as the employer, in all good faith but simply inaccurately, believed the $1.00 was not owed. Let us assume that the seaman files suit to recover the $1.00 prior to the expiration of the relevant statute of limitations, analogous for purposes of determining laches, and that there is in fact no valid laches defense.[34] Finally, let us assume that the case is tried within one year and judgment is granted in the seaman's favor on the fifth anniversary of the withholding of the $1.00. The total penalty, if paid on the date of judgment, resulting from the wrongful failure of the employer to pay $1.00, would be $369,380.00.

Respondent respectfully submits that such a consequence is absurd, unjust and simply not the "remedy" intended by the Congress to be provided by 46 U.S.C. § 596. Yet that would be the result mandated if Petitioner's view of § 596 were accurate. The legislative intent is effectuated and a reasonable and just result obtained where the courts determine the appropriate penalty period through the exercise of their discretion based on the equities of the particular case.

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34. *See, e.g., McCanville v. Florida Towing Corp.*, 321 F.2d 162 (5th Cir. 1963). The state limitation would be applied as the initial, analogous test on a laches defense against a claim for recovery of seamen's wages. Typically, for a laches defense to be sustained, suit must have been filed after the expiration of the state limitation period, there must have been no acceptable excuse for such delay, and the delay must have resulted in prejudice to the defense of the defendant.

III.

COURTS SHOULD, BASED ON THE EQUITIES OF THE PARTICULAR CASE, EXERCISE DISCRETION IN DETERMINING THE PERIOD TO WHICH THE STATUTORY PENALTY PROVIDED BY 46 U.S.C. § 596 IS TO BE APPLIED, SO AS TO EFFECTUATE THE LEGISLATIVE INTENT OF THE STATUTE AND SO AS TO REACH A JUST AND APPROPRIATE RESULT.

This Court in *Pacific Mail S.S. Co. v. Schmidt,*[35] recognized that the penalty period provision of the statute was subject to judicial interpretation and definition. The wages at issue there were improperly withheld, that is, technically withheld "without sufficient cause," but the Court through Mr. Justice Holmes suspended the penalty during the pendency of the appeal of the district court's decision, recognizing the equities involved, stating:

> "It is a very different thing [than the determination of whether the wages were withheld without sufficient cause], however, to say that the delay occasioned by the appeal was not for sufficient cause. Even on the assumption that the petitioner was wrong, [the respondent] had strong and reasonable ground for believing that the statute ought not to be held to apply. So that the question before us is whether we are to construe the Act of Congress as imposing this penalty during a reasonable attempt to secure a revision of doubtful questions of law and fact, although its language is "neglect . . . without sufficient cause." The question answers itself. We are not to assume that Congress would attempt to cut off the reasonable assertion of supposed rights

35. 241 U.S. 245 (1916).

> by devices that have had to be met by stringent measures when practised by the states. *Ex Parte Young*, 209 U.S. 123, 52 L.Ed. 714, 13 L.R.A. (N.S.) 932, 28 S.Ct. Rep. 441, 14 Ann. Cas. 764. There was sufficient cause for the neglect to pay after the decree of the district court, since the payment of the original wages without the penalty that was reasonably in dispute would neither have been accepted nor allowed.[36]

Four United States courts of appeal[37] and various district courts[38] have correctly interpreted and applied 46 U.S.C. § 596 in light of *Pacific S.S. Co. v. Schmidt*, exercising their judicial discretion in determining whether a withholding is with or without sufficient cause and, if without sufficient cause, in determining the appropriate penalty period. These courts have uniformly held that the time for which the penalty provision runs shall rest within the sound discretion of the court, depending upon and to be determined by the equities of the particular case.

The only cases, relied upon by Petitioner herein, which reject this clear and consistent line of authority are *Swain*

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36. *Id.* at 250-51.

37. *Mavromatis v. United Greek Shipowners Corp.*, 179 F.2d 310 (1st Cir. 1950); *Forster v. Oro Navigation Co.*, 228 F.2d 319 (2d Cir. 1955), *aff'g* 128 F.Supp. 113 (S.D.N.Y. 1954); *Southern Cross S.S. Co. v. Firipis*, 285 F.2d 651 (4th Cir. 1960), *cert. denied* 365 U.S. 869 (1961); *Prindes v. S.S. AFRICAN PILGRIM*, 266 F.2d 125 (4th Cir. 1959); *Mystic S.S. Co. v. Stromland*, 20 F.2d 342 (4th Cir. 1927); *Caribbean Federation Lines v. Dahl*, 315 F.2d 370 (5th Cir.), *cert. denied* 375 U.S. 831 (1963).

38. *Ventiadis v. C.J. Thibodeaux & Co.*, 295 F.Supp. 135 (S.D. Tex. 1968); *Kontos v. S.S. SOPHIE C*, 236 F.Supp. 664 (E.D. Pa. 1964); *Spero v. The ARGODON*, 150 F.Supp. 1 (E.D. Va. 1957); *Samad v. The ETIVEBANK*, 134 F.Supp. 530 (E.D. Va. 1955); *The VICTORIA*, 76 F.Supp. 54 (S.D.N.Y. 1947), *rev'd on other grounds sub nom. Usatorre v. The VICTORIA*, 172 F.2d 434 (2d Cir. 1949); *The CHESTER*, 25 F.2d 908 (D. Md. 1928).

v. Isthmian Lines, Inc.,[39] *Escobar v. S.S. WASHINGTON TRADER*,[40] *Thomas v. S.S. SANTA MERCEDES*[41] and *Larkins v. Hudson Waterways Corp.*[42] The court of appeals in *Escobar* accepted the reasoning of the court of appeals in *Swain* without commenting upon the rationale of the *Swain* decision. *Thomas* and *Larkin* were decided upon the precedential effect of *Escobar*. Consequently, *Swain* is the only decision which provides any arguable basis for rejecting the rule adopted by the four other courts of appeal.

A close review of the *Swain* case will disclose that that court improperly interpreted the decision of Mr. Justice Holmes in *Pacific Mail S.S. Co. v. Schmidt*,[43] terming that decision "sui generis" when in fact that case does stand for the proposition that the judiciary has authority to exercise discretion in determining the time for which the penalty provision of 46 U.S.C. § 596 runs.[44] If courts are not entitled to exercise any discretion in respect to the statutory penalty period, as Petitioner would suggest, Mr. Justice Holmes' decision in *Pacific Mail S.S. Co. v. Schmidt* is wrong as are this Court's denials of petitions for writs of certiorari in *Southern Cross S.S. Co. v. Firipis*[45] and *Caribbean Federation Lines v. Dahl.*[46] The

39. 360 F.2d 81 (3d Cir. 1966).

40. 503 F.2d 271 (9th Cir. 1974), *vacated and remanded on other grounds* 423 U.S. 1070 (1976).

41. 572 F.2d 1331 (9th Cir. 1978).

42. 640 F.2d 997 (9th Cir. 1981).

43. 241 U.S. 245.

44. *Id.* at 250-51.

45. 285 F.2d 651 (4th Cir. 1960), *cert. denied* 365 U.S. 869 (1961).

46. 315 F.2d 370 (5th Cir.), *cert. denied* 375 U.S. 831 (1963).

court of appeals in *Swain*, and the subsequent cases relying on it, concluded that "the language of § 596 must be read as a mandatory command to the judiciary."[47] If that is in fact true, no adjustment of the penalty period for any reason would ever be permissible. That is simply not the interpretation this Court has given to § 596 in its prior decision in *Pacific Mail S.S. Co. v. Schmidt*. The United States Court of Appeals for the Third Circuit wrongly decided *Swain* because of its misinterpretation of Mr. Justice Holmes' opinion in *Pacific Mail S.S. Co. v. Schmidt*. The subsequent cases relying on *Swain* are, consequently, also wrongly decided.

Petitioner's attempt to reconcile the holding of *Pacific Mail S.S. Co. v. Schmidt* with his contention, on the basis of the principle of merger, is insupportable. As Petitioner admits, that decision's basis in no way depended upon the merger principle. In addition the cited cases concern penal statutes which, as has been previously discussed, 46 U.S.C. § 596 is not.

Similarly, *McCrae v. United States*[48] in no way contradicts *Pacific Mail S.S. Co. v. Schmidt's* holding that courts may exercise discretion in respect to the 46 U.S.C. § 596 penalty period.

To allow courts to exercise their discretion in respect to determination of the statutory penalty period under 46 U.S.C. § 596 is to effectuate the legislative intent underlying the statute by providing seamen with a just and reasonable remedy where their wages have been improperly withheld.

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47. *Swain v. Isthmian Lines, Inc.*, 360 F.2d at 88.

48. 294 U.S. 23 (1935).

IV.

THE AUTHORITY OF A COURT TO EXERCISE DISCRETION IN RESPECT TO THE DETERMINATION OF THE PENALTY PERIOD UNDER 46 U.S.C. § 596 IS IN NO WAY AFFECTED BY THE AVAILABILITY OF THE RIGHT TO SUSPEND PENALTY LIABILITY THROUGH A TENDER OF THE DISPUTED WAGE CLAIM INTO THE REGISTRY OF THE COURT.

While an employer might well elect to pay a seaman's disputed wage claim into the registry of the court, to suspend potential penalty liability under 46 U.S.C. § 596, there is no basis, in law or in equity, to require such a payment at the risk of being subject to automatic penalty liability for an indeterminate period of time, a period which would not, under the Petitioner's theory, be subject to the court's discretion. To impose such a requirement would add to the existing statute a provision neither contemplated nor enacted by Congress nor necessary to the effectuation of the legislative intent underlying the statute. In addition, as a practical matter, it would obviously have no effect on the accrual of penalty liability prior to the filing of a suit by the seaman, a period which is properly considered by a court exercising its discretion in respect to the § 596 penalty period. Petitioner's suggestion flies directly in the face of Mr. Justice Holmes' decision in *Pacific Mail S.S. Co. v. Schmidt.*

Finally, Petitioner's suggestion that an unconditional tender of wages to the seaman acts to terminate the accrual of penalty liability for the period after such tender, while accurate, ignores the fact that such tender is neither required by the statute nor necessary to the

effectuation of its legislative intent. The availability of such tender would, of course, have no effect if the wage claim was not known to the employer or if the employer believed that the seaman's claim was unfounded or that its own position was correct. If anything, such a requirement would act to coerce the employer to forego the assertion of valid defenses to wage claims as the employer would be unable to look to the courts for the exercise of discretion in determining the penalty period if the employer's defense proved not to be well founded.

CONCLUSION

The decisions of the district court and the court of appeals below correctly apply and interpret 46 U.S.C. § 596 under the precedents of this Court and of the majority of the courts of appeals and the district courts which have considered the issue. Such an approach is consistent with the judicial obligation to interpret and apply a statute so as to effectuate its purpose. This is precisely what was done in the instant case by the courts below. The decisions of the United States District Court for the Eastern District of Texas and the United States Court of Appeals for the Fifth Circuit are correct.

WHEREFORE, PREMISES CONSIDERED, Respondent Oceanic Contractors, Inc., respectfully prays that the decisions of the United States District Court for the

Eastern District of Texas and of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief for Respondent was served upon Mr. Robert A. Chaffin, 3500 Travis, Houston, Texas 77002, attorney for Petitioner, by mailing three (3) copies of same to him in the United States mail, first class postage prepaid, this 26th day of February, 1982, and that he is the attorney for the only other party to be served in this matter.

Theodore Goller

THEODORE GOLLER

Petitioner's Reply Brief

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. 81-614

DANNY L. GRIFFIN,
Petitioner

v.

OCEANIC CONTRACTORS, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

To The Honorable Chief Justice And The Associate Justices Of The Supreme Court:

Petitioner, Danny L. Griffin, respectfully submits this its Reply Brief on Writ of Certiorari and respectfully prays that this Honorable Court reverse the decisions of the courts below on the issue presented for review.

ARGUMENT

NEITHER THE LEGISLATIVE HISTORY OF THE PENALTY WAGE STATUTE, 46 U.S.C. § 596, NOR THE GENERALLY ACCEPTED RULES OF STATUTORY INTERPRETATION OFFER ANY SUPPORT TO RESPONDENT'S POSITION THAT THE COURTS SHOULD DECLINE TO ENFORCE THE PENALTY WAGE STATUTE EXACTLY AS WRITTEN.

The language of 46 U.S.C. § 596 is clear and unambiguous. Neither party truly quarrels with this fact. At issue is not what the statute says but rather if the courts should decline to enforce the statute as enacted by Congress merely because the statute has the potential to produce severe financial penalties for violators. There is no challenge by Respondent to the constitutionality of the statute. Should the judiciary refuse to enforce the statute because the result produced by enforcement of the statute is disagreeable to the violator? No precedent exists for such judicial action. To sustain the Respondent's position courts would be forced to ignore the ordinary meaning of plain language. No case cited by the Respondent in their brief is directly supportive of the position Respondent would have this Honorable Court adopt. Respondent fails to cite a single case wherein the courts ignored the plain language of an otherwise constitutional statute to reach a contrary result to that clearly dictated by the statute. An elementary rule of statutory construction is that if the language of the statute is on its face plain and if the law is within the constitutional authority of the enacting legislature then the sole function of the courts is to enforce the statute according to its terms.[1]

1. *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

As recently as 1979, this Honorable Court dealt with a situation involving the interpretation of a statute which if applied according to its plain terms could have severe financial results for violators of the law.[2] While candidly recognizing that potentially harsh financial results that might accrue through literal statutory interpretation this Honorable Court nevertheless declined to let such reasoning negate the plain meaning of a validly enacted law. In so holding Chief Justice Burger made it clear, "these are not unimportant considerations, but they are policy considerations more properly addressed to Congress than to this Court."[3] The specific holding was that "we must take the statute as we find it."[4] Such should unequivocally be the result in the case at bar. Courts should take the penalty wage statute just as they find it and not yield to the temptation to judicially amend the statute so as to produce a result more pallative to violators. Once the Congress has clearly spoken, the judiciary must follow, not lead.

There is nothing in the extremely brief legislative history of 46 U.S.C. § 596 nor in the plain wording of the statute to indicate that Congress intended for the courts to determine and assess the time period for which the statutory payment accrues according to the individual merits of each case. In point of fact, the legislative history indicates the exact opposite since the statute was amended to delete language which limited the penalty time period to not more than ten days.[5] When confronted

2. *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

3. Id. at 345.

4. Id. at 344.

5. Brief for Petitioner, pp. 13-15.

with a statute which is plain and unambiguous on its face, the courts ordinarily do not even look to its legislative history as a guide to its meaning.[6] Absent a clearly expressed legislative intent to the contrary, the plain language of a statute must ordinarily be regarded as conclusive.[7] Further, where the language of the statute in question is clear in its context and not in conflict with the legislative history, the words of the statute must prevail.[8] Severe financial penalties do not as a matter of law create absurd or unjust results as the Respondent would have this Honorable Court believe. The financial results produced by the enforcement of the plain language of a constitutionally valid statute should not be deemed absurd or unjust where such results were subject to ready predictability by the enacting legislature. Congress is vested with the power to decide the severity of a financial penalty which is appropriate for the violation of validly enacted statutes.

In its most elementary form the Respondent's entire case may be stated as follows: the result produced via the literal application of 46 U.S.C. § 596 is simply too harsh, i.e. unjust and absurd in the words of the Respondent, and therefore the Courts should decline to enforce the law since surely Congress did not intend this result even though the law reads quite clearly. Harsh results are not uncommon where the language of the statute is clear and constitutional courts must enforce the statute. A small fish known as the snail darter completely halted

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6. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

7. *Aaron v. Securities and Exchange Com'n*, 446 U.S. 680 (1980).

8. *Consumer Product Safety Com'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

the construction of a multi-million dollar federal project simply because a federal statute when interpreted as written produced this result.[9] While not in danger of extinction, seamen have long been classified as a group in need of special care and protection. What might seem an absurd or unjust result to some is the opposite to others. Subjective judgments once made by the Congress and enacted as law are not to be reevaluated by the judiciary at some later date. Courts do not possess veto power.

In what must surely be termed a bootstrapping argument, Respondent would have this Honorable Court believe that enforcement of the penalty wage statute as written will produce windfall awards of great proportion. Such reasoning is purely speculative and as such not to be considered.[10] In addition, recent history totally fails to support Respondent's contention. The Third Circuit has operated under the mandatory rule since 1966[11] and the Ninth Circuit since 1974.[12] As yet, not a single windfall type case has been reported in either jurisdiction despite a combined total of twenty-four years judicial experience. It is not for the courts to speculate, much less act, on whether Congress would have altered its stance and changed the law had the specific events of each individual case been anticipated.[13]

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9. Supra, N. 6.

10. 100 S.Ct. at 2053 (1980).

11. *Swain v. Isthmian Lines, Inc.*, 360 F.2d 81 (3rd Cir. 1966).

12. *Escobar v. Washington Trade*, 503 F.2d 271 (9th Cir. 1974), vacated and remanded on other grounds sub nom *American Trading Transp. Co. v. Escobar*, 423 U.S. 1070 (1976).

13. 437 U.S. at 185.

CONCLUSION

Petitioner respectfully prays this Honorable Court to reverse the judgment of the District Court and render judgment according to the plain terms of 46 U.S.C. § 596, that he be awarded two days' pay for each and every day Respondents delayed in failing to pay wages rightfully due Petitioner.

Respectfully submitted,

FRIEDMAN AND CHAFFIN

ROBERT A. CHAFFIN

CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Petitioner's Reply Brief was provided to opposing counsel, Mr. Theodore Goller, Fulbright & Jaworski, Bank of the Southwest Building, Houston, TX, 77002 by placing a copy of same in the United States mail, postage prepaid, on this _____ day of April, 1982.

ROBERT A. CHAFFIN